

400. Negligence—Essential Factual Elements

[Name of plaintiff] claims that *[he/she]* was harmed by *[name of defendant]*'s negligence. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* was negligent;
 2. That *[name of plaintiff]* was harmed; and
 3. That *[name of defendant]*'s negligence was a substantial factor in causing *[name of plaintiff]*'s harm.
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New September 2003; Revised February 2005, June 2005, December 2007, December 2011

Directions for Use

In medical malpractice or professional negligence cases, the word “medical” or “professional” should be added before the word “negligence” in the first paragraph. The word “harm” is used throughout these instructions, instead of terms like “loss,” “injury,” and “damage,” because “harm” is all-purpose and suffices in their place.

Sources and Authority

- General Duty to Exercise Due Care. Civil Code section 1714(a).
- “Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.” (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112 [70 Cal.Rptr. 97, 443 P.2d 561].)
- “The elements of a cause of action for negligence are well established. They are “(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury.” ’ ” (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 [50 Cal.Rptr.2d 309, 911 P.2d 496].)
- “Breach is the failure to meet the standard of care.” (*Coyle v. Historic Mission Inn Corp.* (2018) 24 Cal.App.5th 627, 643 [234 Cal.Rptr.3d 330].)
- “The element of causation requires there to be a connection between the

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defendant's breach and the plaintiff's injury." (*Coyle, supra*, 24 Cal.App.5th at p. 645.)

- “ “In most cases, courts have fixed no standard of care for tort liability more precise than that of a reasonably prudent person under like circumstances.’ This is because ‘[e]ach case presents different conditions and situations. What would be ordinary care in one case might be negligence in another.’ ” (*Coyle, supra*, 24 Cal.App.5th at pp. 639–640, internal citation omitted.)
- “ “[I]t is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform.” [Citation.] [¶] The formulation of the standard of care is a question of law for the court. [Citations.] Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether the defendant's conduct has conformed to the standard. [Citations.] ” (*Regents of University of California v. Superior Court* (2018) 29 Cal.App.5th 890, 902–903 [240 Cal.Rptr.3d 675].)
- “The first element, duty, ‘may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship.’ ” (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1128 [214 Cal.Rptr.3d 552].)
- “[T]he existence of a duty is a question of law for the court.” (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)
- “In the *Rowland* [*Rowland, supra*, 69 Cal.2d at p. 113] decision, this court identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714: ‘the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.’ As we have also explained, however, in the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where ‘clearly supported by public policy.’ ” (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 [122 Cal.Rptr.3d 313, 248 P.3d 1170], internal citations omitted.)
- “[T]he analysis of foreseeability for purposes of assessing the existence or scope of a duty is different, and more general, than it is for assessing whether any such duty was breached or whether a breach caused a plaintiff's injuries. ‘[I]n analyzing duty, the court's task “ ‘is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the *category* of negligent conduct at issue is sufficiently likely to result in the *kind* of harm experienced that liability may appropriately be imposed on the negligent party.’ ” ” “The

jury, by contrast, considers “foreseeability” in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant’s conduct was negligent in the first place. Second, foreseeability may be relevant to the jury’s determination of whether the defendant’s negligence was a proximate or legal cause of the plaintiff’s injury.’ ” (*Staats v. Vintner’s Golf Club, LLC* (2018) 25 Cal.App.5th 826, 837 [236 Cal.Rptr.3d 236], original italics, internal citation omitted.)

- “[T]he concept of foreseeability of risk of harm in determining whether a duty should be imposed is to be distinguished from the concept of ‘ “foreseeability” in two more focused, fact-specific settings’ to be resolved by a trier of fact. ‘First, the [trier of fact] may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant’s conduct was negligent in the first place. Second, foreseeability may be relevant to the [trier of fact’s] determination of whether the defendant’s negligence was a proximate or legal cause of the plaintiff’s injury.’ ” (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 488, fn. 8 [93 Cal.Rptr.3d 130], internal citation omitted.)
- “By making exceptions to Civil Code section 1714’s general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make. . . . While the court deciding duty assesses the foreseeability of injury from ‘the category of negligent conduct at issue,’ if the defendant did owe the plaintiff a duty of ordinary care the jury ‘may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant’s conduct was negligent in the first place.’ An approach that instead focused the duty inquiry on case-specific facts would tend to ‘eliminate the role of the jury in negligence cases, transforming the question of whether a defendant breached the duty of care under the facts of a particular case into a legal issue to be decided by the court’ ” (*Cabral, supra*, 51 Cal.4th at pp. 772–773, original italics, internal citations omitted.)
- “[W]hile foreseeability with respect to duty is determined by focusing on the general character of the event and inquiring whether such event is ‘likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct’, foreseeability in evaluating negligence and causation requires a ‘more focused, fact-specific’ inquiry that takes into account a particular plaintiff’s injuries and the particular defendant’s conduct.” (*Laabs v. Southern California Edison Company* (2009) 175 Cal.App.4th 1260, 1273 [97 Cal.Rptr.3d 241], internal citation omitted.)
- “[Defendant] relies on the rule that a person has no general duty to safeguard another from harm or to rescue an injured person. But that rule has no application where the person has caused another to be put in a position of peril

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of a kind from which the injuries occurred.” (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 883 [174 Cal.Rptr.3d 339].)

- “A defendant may owe a duty to protect the plaintiff from third party conduct if the defendant has a special relationship with either the plaintiff or the third party.” (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 440 [241 Cal.Rptr.3d 616].)
- “Typically, in special relationships, “the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff’s welfare. [Citation.]” [Citation.] A defendant who is found to have a “special relationship” with another may owe an affirmative duty to protect the other person from foreseeable harm, or to come to the aid of another in the face of ongoing harm or medical emergency.’ ” (*Carlsen, supra*, 227 Cal.App.4th at p. 893.)
- “Generally, a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger. [Citation.] Consequently, California courts have frequently recognized special relationships between children and their adult caregivers that give rise to a duty to prevent harms caused by the intentional or criminal conduct of third parties.” (*Doe, supra*, 8 Cal.App.5th at p. 1129, internal citations omitted.)
- “[P]ostsecondary schools *do* have a special relationship with students while they are engaged in activities that are part of the school’s curriculum or closely related to its delivery of educational services.” (*The Regents of the University of California v. Superior Court* (2018) 4 Cal.5th 607, 624–625 [230 Cal.Rptr.3d 415, 413 P.3d 656], original italics.)
- “[A] university’s duty to protect students from foreseeable acts of violence is governed by the ordinary negligence standard of care, namely ‘that degree of care which people of ordinarily prudent behavior could be reasonably expected to exercise under the circumstances.’ ” (*Regents of University of California, supra*, 29 Cal.App.5th at p. 904.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1138, 1450–1460, 1484–1491

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.4–1.18

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.02, 1.12, Ch. 2, *Causation*, § 2.02, Ch. 3, *Proof of Negligence*, § 3.01 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.10 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.10, 165.20 (Matthew Bender)

426. Negligent Hiring, Supervision, or Retention of Employee

[Name of plaintiff] claims that *[he/she]* was harmed by *[name of employee]* and that *[name of employer defendant]* is responsible for that harm because *[name of employer defendant]* negligently **hired/ supervised/ [or] retained** *[name of employee]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. **That** *[name of employer defendant]* **hired** *[name of employee]*;
2. **That** *[name of employee]* **[[was/became] [unfit [or] incompetent] to perform the work for which [he/she] was hired/[specify other particular risk]]**;
3. **That** *[name of employer defendant]* **knew or should have known that** *[name of employee]* **[[was/became] [unfit/ [or] incompetent]/ [other particular risk]] and that this [unfitness [or] incompetence/ [other particular risk]] created a particular risk to others**;
4. **That** *[name of employee]*'s **[unfitness [or] incompetence/[other particular risk]] harmed** *[name of plaintiff]*; **and**
5. **That** *[name of employer defendant]*'s **negligence in [hiring/ supervising/ [or] retaining] [name of employee] was a substantial factor in causing** *[name of plaintiff]*'s harm.

New December 2009; Revised December 2015, June 2016

Directions for Use

Give this instruction if the plaintiff alleges that the employer of an employee who caused harm was negligent in the hiring, supervision, or retention of the employee after actual or constructive notice that the employee created a particular risk or hazard to others. For instructions holding the employer vicariously liable (without fault) for the acts of the employee, see the Vicarious Responsibility series, CACI No. 3700 et seq.

Include optional question 1 if the employment relationship between the defendant and the negligent person is contested. (See *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1185–1189 [183 Cal.Rptr.3d 394].) It appears that liability may also be imposed on the hirer of an independent contractor for the negligent selection of the contractor. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 662–663 [109 Cal.Rptr. 269].) Therefore, it would not seem to be necessary to instruct on the test to determine whether the relationship is one of employer-employee or hirer-independent contractor. (See CACI No. 3704, *Existence of "Employee" Status Disputed*.)

Choose "became" in elements 2 and 3 in a claim for negligent retention.

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In most cases, “unfitness” or “incompetence” (or both) will adequately describe the particular risk that the employee represents. However, there may be cases in which neither word adequately describes the risk that the employer should have known about.

Sources and Authority

- “California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee.” (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 [58 Cal.Rptr.2d 122].)
- “Negligence liability will be imposed on an employer if it ‘knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.’ ” (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 [91 Cal.Rptr.3d 864].)
- “[Plaintiff] brought several claims against [defendant employer], including negligent hiring, supervising, and retaining [employee], and failure to warn. To prevail on his negligent hiring/retention claim, [plaintiff] will be required to prove [employee] was [defendant employer]’s agent and [defendant employer] knew or had reason to believe [employee] was likely to engage in sexual abuse. On the negligent supervision and failure to warn claims, [plaintiff] will be required to show [defendant employer] knew or should have known of [employee]’s alleged misconduct and did not act in a reasonable manner when it allegedly recommended him to serve as [plaintiff]’s Bible instructor.” (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 591 [201 Cal.Rptr.3d 156], internal citations omitted.)
- “Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability.” (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 [52 Cal.Rptr.3d 376].)
- “Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees. The tort has developed in California in factual settings where the plaintiff’s injury occurred in the workplace, or the contact between the plaintiff and the employee was generated by the employment relationship.” (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339–1340 [78 Cal.Rptr.2d 525].)
- “To establish negligent supervision, a plaintiff must show that a person in a supervisory position over the actor had prior knowledge of the actor’s propensity to do the bad act.” (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902 [189 Cal.Rptr.3d 570].)
- “Apparently, [defendant] had no actual knowledge of [the employee]’s past. But the evidence recounted above presents triable issues of material fact regarding whether the [defendant] had reason to believe [the employee] was unfit or whether the [defendant] failed to use reasonable care in investigating [the

employee].” (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 843 [10 Cal.Rptr.2d 748]; cf. *Flores v. AutoZone West Inc.* (2008) 161 Cal.App.4th 373, 384–386 [74 Cal.Rptr.3d 178] [employer had no duty to investigate and discover that job applicant had a juvenile delinquency record].)

- “We note that the jury instructions issued by our Judicial Council include ‘substantial factor’ causation as an element of the tort of negligent hiring, retention, or supervision. The fifth element listed in CACI No. 426 is ‘[t]hat [name of employer defendant]’s negligence in [hiring/ supervising/ [or] retaining] [name of employee] was a substantial factor in causing [name of plaintiff]’s harm.’ [¶] CACI No. 426 is consistent with California case law on the causation element of [plaintiff]’s claim against [employer].” (*Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co., Inc.* (2018) 5 Cal.5th 216, 224, fn.5 [233 Cal.Rptr.3d 487, 418 P.3d 400], original italics.)
- “A claim that an employer was negligent in hiring or retaining an employee-driver rarely differs in substance from a claim that an employer was negligent in entrusting a vehicle to the employee. Awareness, constructive or actual, that a person is unfit or incompetent to drive underlies a claim that an employer was negligent in hiring or retaining that person as a driver. (See Judicial Council of Cal. Civ. Jury Instns. (2011) CACI No. 426.) That same awareness underlies a claim for negligent entrustment. (See CACI No. 724.) In a typical case, like this, the two claims are functionally identical.” (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1157 [126 Cal.Rptr.3d 443, 253 P.3d 535].)
- “[I]f an employer admits vicarious liability for its employee’s negligent driving in the scope of employment, ‘the damages attributable to both employer and employee will be coextensive.’ Thus, when a plaintiff alleges a negligent entrustment or hiring cause of action against the employer and the employer admits vicarious liability for its employee’s negligent driving, the universe of defendants who can be held responsible for plaintiff’s damages is reduced by one—the employer—for purposes of apportioning fault under Proposition 51. Consequently, the employer would not be mentioned on the special verdict form. The jury must divide fault for the accident among the listed tortfeasors, and the employer is liable only for whatever share of fault the jury assigns to the employee.” (*Diaz, supra*, 41 Cal.4th at p. 1159, internal citations omitted.)
- “[W]hen an employer . . . admits vicarious liability, neither the complaint’s allegations of employer misconduct relating to the recovery of punitive damages nor the evidence supporting those allegations are superfluous. Nothing in *Diaz* or *Armenta* suggests otherwise.” (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1264 [218 Cal.Rptr.3d 664].)
- “[A] public school district may be vicariously liable under [Government Code] section 815.2 for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student.” (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 879 [138 Cal.Rptr.3d 1, 270 P.3d 699].)

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- “[P]laintiff premises her direct negligence claim on the hospital’s alleged failure to properly screen [doctor] before engaging her and to properly supervise her after engaging her. Since hiring and supervising medical personnel, as well as safeguarding incapacitated patients, are clearly within the scope of services for which the hospital is licensed, its alleged failure to do so necessarily states a claim for professional negligence. Accordingly, plaintiff cannot pursue a claim of direct negligence against the hospital.” (*So v. Shin* (2013) 212 Cal.App.4th 652, 668 [151 Cal.Rptr.3d 257].)
- “[Asking] whether [defendant] hired [employee] was necessary given the dispute over who hired [employee]—[defendant] or [decedent]. As the trial court noted, ‘The employment was neither stipulated nor obvious on its face.’ However, if the trial court began the jury instructions or special verdict form with, ‘Was [employee] unfit or incompetent to perform the work for which he was hired,’ confusion was likely to result as the question assumed a hiring. Therefore, the jury needed to answer the question of whether [defendant] hired [employee] before it could determine if [defendant] negligently hired, retained, or supervised him.” (*Jackson, supra*, 233 Cal.App.4th at pp. 1187–1188.)
- “Any claim alleging negligent hiring by an employer will be based in part on events predating the employee’s tortious conduct. Plainly, that sequence of events does not itself preclude liability.” (*Liberty Surplus Ins. Corp., supra*, 5 Cal.5th at p. 225, fn. 7.)
- “We find no relevant case law approving a claim for direct liability based on a public entity’s allegedly negligent hiring and supervision practices. . . . Here, . . . there is no statutory basis for declaring a governmental entity liable for negligence in its hiring and supervision practices and, accordingly, plaintiffs’ claim against County based on that theory is barred. . . .” (*de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 252–253 [67 Cal.Rptr.3d 253].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1350

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-H, *Employment Torts and Related Claims—Negligence*, ¶ 5:615 et seq. (The Rutter Group)

3 California Torts, Ch. 40B, *Employment Discrimination and Harassment*, § 40B.21 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer’s Liability for Employee’s Torts*, § 248.12 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.22 (Matthew Bender)

450A. Good Samaritan—Nonemergency

[Name of defendant] claims that *[he/she]* is not responsible for *[name of plaintiff]*'s harm because *[he/she]* was voluntarily trying to protect *[name of plaintiff]* from harm in a nonemergency situation. If you decide that *[name of defendant]* was negligent, *[he/she]* is not responsible unless *[name of plaintiff]* proves both of the following:

1. **[(a) That *[name of defendant]*'s failure to use reasonable care added to the risk of harm;]**

[or]

- [(b) That *[name of defendant]*'s conduct caused *[name of plaintiff]* to reasonably rely on *[his/her]* protection;]**

AND

2. **That the [additional risk/ [or] reliance] was a substantial factor in causing harm to *[name of plaintiff]*.**
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Derived from former CACI No. 450 December 2010

Directions for Use

Use this instruction for situations other than at the scene of an emergency. Different standards apply in an emergency situation. (See Health & Saf. Code, § 1799.102; CACI No. 450B, *Good Samaritan—Scene of Emergency*.) Give both instructions if the jury will be asked to decide whether an emergency existed as the preliminary issue. Because under Health and Safety Code section 1799.102 a defendant receives greater protection in an emergency situation, the advisory committee believes that the defendant bears the burden of proving an emergency. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted].)

Select either or both options for element 1 depending on the facts.

Sources and Authority

- Good Samaritan Immunity for Medical Licensees. Business and Professions Code sections 2395–2398.
- Good Samaritan Immunity for Nurses. Business and Professions Code sections 2727.5, 2861.5.
- Good Samaritan Immunity for Dentists. Business and Professions Code section 1627.5.
- Good Samaritan Immunity for Rescue Teams. Health and Safety Code section 1317(f).
- Good Samaritan Immunity for Persons Rendering Emergency Medical Services

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Health and Safety Code section 1799.102.

- Good Samaritan Immunity for Paramedics. Health and Safety Code section 1799.104.
- Good Samaritan Immunity for First-Aid Volunteers. Government Code section 50086.
- “Under well-established common law principles, a person has no duty to come to the aid of another. If, however, a person elects to come to someone’s aid, he or she has a duty to exercise due care. Thus, a ‘good Samaritan’ who attempts to help someone might be liable if he or she does not exercise due care and ends up causing harm.” (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 324 [86 Cal.Rptr.3d 350, 197 P.3d 164], internal citations omitted.)
- “A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. Also pertinent to our discussion is the role of the volunteer who, having no initial duty to do so, undertakes to come to the aid of another—the ‘good Samaritan.’ . . . He is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking.” (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [192 Cal.Rptr. 233, 664 P.2d 137], internal citations omitted.)
- “A defendant does not increase the risk of harm by merely failing to eliminate a preexisting risk.” (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 450 [241 Cal.Rptr.3d 616].)
- “A police officer, paramedic or other public safety worker is as much entitled to the benefit of this general rule as anyone else.” (*Camp v. State of California* (2010) 184 Cal.App.4th 967, 975 [109 Cal.Rptr.3d 676].)
- “The police owe duties of care only to the public at large and, except where they enter into a ‘special relationship,’ have no duty to offer affirmative assistance to anyone in particular.” (*Arista v. County of Riverside* (2018) 29 Cal.App.5th 1051, 1060–1061 [241 Cal.Rptr.3d 437].)
- “Under the good Samaritan doctrine, CHP may have a duty to members of the public to exercise due care when CHP voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member thereby inducing reliance, when an express promise to warn of a danger has induced reliance, or when the actions of CHP place a person in peril or increase the risk of harm. In other words, to create a special relationship and a duty of care, there must be evidence that CHP ‘made misrepresentations that induced a citizen’s detrimental reliance [citation], placed a citizen in harm’s way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions.’” Nonfeasance that leaves the citizen in exactly the same position that he or she already occupied cannot support a

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finding of duty of care. Affirmative conduct or misfeasance on the part of CHP that induces reliance or changes the risk of harm is required.” (*Greyhound Lines, Inc. v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1136 [152 Cal.Rptr.3d 492], internal citations omitted.)

- “A special relationship can be found ‘when the state, through its agents, voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member, thereby inducing reliance, it is held to the same standard of care as a private person or organization.’ ” (*Arista, supra*, 29 Cal.App.5th at p. 1061.)

Secondary Sources

4 Witkin, *California Procedure* (5th ed. 2008) Pleadings, § 594

6 Witkin, *Summary of California Law* (11th ed. 2017) Torts, §§ 1205–1210

Flahavan et al., *California Practice Guide: Personal Injury* (The Rutter Group) ¶¶ 2:583.10–2:583.11, 2:876

1 Levy et al., *California Torts*, Ch. 1, *Negligence: Duty and Breach*, § 1.11 (Matthew Bender)

4 *California Trial Guide*, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

33 *California Forms of Pleading and Practice*, Ch. 380, *Negligence*, § 380.32[5][c] (Matthew Bender)

16 *California Points and Authorities*, Ch. 165, *Negligence*, § 165.150 (Matthew Bender)

450C. Negligent Undertaking

[Name of plaintiff] claims that [name of defendant] is responsible for [name of plaintiff]’s harm because [name of defendant] failed to exercise reasonable care in rendering services to [name of third person]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant], voluntarily or for a charge, rendered services to [name of third person];**
- 2. That these services were of a kind that [name of defendant] should have recognized as needed for the protection of [name of plaintiff];**
- 3. That [name of defendant] failed to exercise reasonable care in rendering these services;**
- 4. That [name of defendant]’s failure to exercise reasonable care was a substantial factor in causing harm to [name of plaintiff]; and**
- 5. [(a) That [name of defendant]’s failure to use reasonable care added to the risk of harm;]**

[or]

[(b) That [name of defendant]’s services were rendered to perform a duty that [name of third person] owed to third persons including [name of plaintiff];]

[or]

[(c) That [name of plaintiff] suffered harm because [[name of third person]/ [or] [name of plaintiff]] relied on [name of defendant]’s services.]

New June 2016; Revised November 2018

Directions for Use

This instruction presents the theory of liability known as the “negligent undertaking” rule. (See Restatement Second of Torts, section 324A.) The elements are stated in *Paz v. State of California* (2000) 22 Cal.4th 550, 553 [93 Cal.Rptr.2d 703, 994 P.2d 975].

In *Paz*, the court said that negligent undertaking is “sometimes referred to as the ‘Good Samaritan’ rule,” by which a person generally has no duty to come to the aid of another and cannot be liable for doing so unless the person aiding’s acts increased the risk to the person aided or the person aided relied on the person aiding’s acts. (*Paz, supra*, 22 Cal.4th at p. 553; see CACI No. 450A, *Good Samaritan—Nonemergency*.) It is perhaps more accurate to say that negligent

undertaking is another application of the Good Samaritan rule. CACI No. 450A is for use in a case in which the person aided is the injured plaintiff. (See Restatement 2d of Torts, § 323.) This instruction is for use in a case in which the defendant's failure to exercise reasonable care in performing services to one person has resulted in harm to another person.

Select one or more of the three options for element 5 depending on the facts.

Sources and Authority

- Negligent Undertaking. Restatement Second of Torts section 324A.
- “[T]he [Restatement Second of Torts] section 324A theory of liability—sometimes referred to as the “Good Samaritan” rule—is a settled principle firmly rooted in the common law of negligence. Section 324A prescribes the conditions under which a person who undertakes to render services for another may be liable to third persons for physical harm resulting from a failure to act with reasonable care. Liability may exist *if* (a) the failure to exercise reasonable care increased the risk of harm, (b) the undertaking was to perform a duty the other person owed to the third persons, or (c) the harm was suffered because the other person or the third persons relied on the undertaking.” (*Paz, supra*, 22 Cal.4th at p. 553, original italics.)
- “Thus, as the traditional theory is articulated in the Restatement, and as we have applied it in other contexts, a negligent undertaking claim of liability to third parties requires evidence that: (1) the actor undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons; (3) the actor failed to exercise reasonable care in the performance of the undertaking; (4) the actor's failure to exercise reasonable care resulted in physical harm to the third persons; and (5) *either* (a) the actor's carelessness increased the risk of such harm, or (b) the actor undertook to perform a duty that the other owed to the third persons, or (c) the harm was suffered because either the other or the third persons relied on the actor's undertaking. [¶] Section 324A's negligent undertaking theory of liability subsumes the well-known elements of any negligence action, viz., duty, breach of duty, proximate cause, and damages.” (*Paz, supra*, 22 Cal.4th at p. 559, original italics, internal citation omitted; see also *Scott v. C. R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 775 [180 Cal.Rptr.3d 479] [jury properly instructed on elements as set forth above in *Paz*].)
- “Under this formulation, a duty of care exists when the first, second and fifth elements are established. The third element addresses the breach of that duty of care and the fourth element covers both causation and damages.” (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 691 [236 Cal.Rptr.3d 157].)
- “Section 324A is applied to determine the ‘duty element’ in a negligence action where the defendant has ‘specifically . . . undertaken to perform the task that he is charged with having performed negligently, for without the actual

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assumption of the undertaking there can be no correlative duty to perform that undertaking carefully.”’ The negligent undertaking theory of liability applies to personal injury and property damage claims, but not to claims seeking only economic loss.” (*Lichtman v. Siemens Industry Inc.* (2017) 16 Cal.App.5th 914, 922 [224 Cal.Rptr.3d 725], internal citations omitted.)

- “The foundation for considering whether an actor . . . should be exposed to liability on this theory is whether the actor made a specific undertaking ‘to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully.’”’ (*Jabo v. YMCA of San Diego County* (2018) 27 Cal.App.5th 853, 878 [238 Cal.Rptr.3d 588].)
- “[U]nder a negligent undertaking theory of liability, the scope of a defendant’s duty presents a jury issue when there is a factual dispute as to the nature of the undertaking. The issue of ‘whether [a defendant’s] alleged actions, if proven, would constitute an “undertaking” sufficient . . . to give rise to an actionable duty of care is a legal question for the court.’ However, ‘there may be fact questions “about precisely what it was that the defendant undertook to do.” That is, while “[t]he ‘precise nature and extent’ of [an alleged negligent undertaking] duty ‘is a question of law . . . “it depends on the nature and extent of the act undertaken, a question of fact.”’” [Citation.] Thus, if the record can support competing inferences [citation], or if the facts are not yet sufficiently developed [citation], “ ‘an ultimate finding on the existence of a duty cannot be made prior to a hearing on the merits’ ” [citation], and summary judgment is precluded. [Citations.]’ (see CACI No. 450C [each element of the negligent undertaking theory of liability is resolved by the trier of fact].)” (*O’Malley v. Hospitality Staffing Solutions* (2018) 20 Cal.App.5th 21, 27–28 [228 Cal.Rptr.3d 731], internal citations omitted.)
- “To establish as a matter of law that defendant does not owe plaintiffs a duty under a negligent undertaking theory, defendant must negate all three alternative predicates of the fifth factor: ‘(a) the actor’s carelessness increased the risk of such harm, or (b) the undertaking was to perform a duty owed by the other to the third persons, or (c) the harm was suffered because of the reliance of the other or the third persons upon the undertaking.’” (*Lichtman, supra*, 16 Cal.App.5th at p. 926.)
- “The undisputed facts here present a classic scenario for consideration of the negligent undertaking theory. This theory of liability is typically applied where the defendant has contractually agreed to provide services for the protection of others, but has negligently done so.” (*Lichtman, supra*, 16 Cal.App.5th at p. 927.)
- “The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless they have some relationship that gives rise to a duty to act. However, one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the

other relied on the undertaking. Section 324A integrates these two basic principles in its rule.” (*Paz. supra*, 22 Cal.4th at pp. 558–559.)

- “[T]he ‘negligent undertaking’ doctrine, like the special relationship doctrine, is an exception to the ‘no duty to aid’ rule.” (*Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1231 [186 Cal.Rptr.3d 26].)
- “Under the good Samaritan doctrine, CHP may have a duty to members of the public to exercise due care when CHP voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member thereby inducing reliance, when an express promise to warn of a danger has induced reliance, or when the actions of CHP place a person in peril or increase the risk of harm. In other words, to create a special relationship and a duty of care, there must be evidence that CHP ‘made misrepresentations that induced a citizen’s detrimental reliance [citation], placed a citizen in harm’s way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions.’ Nonfeasance that leaves the citizen in exactly the same position that he or she already occupied cannot support a finding of duty of care. Affirmative conduct or misfeasance on the part of CHP that induces reliance or changes the risk of harm is required.” (*Greyhound Lines, Inc. v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1136 [152 Cal.Rptr.3d 492], internal citations omitted.)
- “A defendant does not increase the risk of harm by merely failing to eliminate a preexisting risk.” (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 450 [241 Cal.Rptr.3d 616].)
- “A operates a grocery store. An electric light hanging over one of the aisles of the store becomes defective, and A calls B Electric Company to repair it. B Company sends a workman, who repairs the light, but leaves the fixture so insecurely attached that it falls upon and injures C, a customer in the store who is walking down the aisle. B Company is subject to liability to C.” (Restat. 2d of Torts, § 324A, Illustration 1.)

Secondary Sources

5 Witkin, *California Procedure* (5th ed. 2018) Pleadings, § 594

9 Witkin, *Summary of California Law* (11th ed. 2017) Torts, §§ 1205–1210

Flahavan et al., *California Practice Guide: Personal Injury* (The Rutter Group) ¶¶ 2:583.10–2:583.11, 2:876

1 Levy et al., *California Torts*, Ch. 1, *Negligence: Duty and Breach*, § 1.11 (Matthew Bender)

4 *California Trial Guide*, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

33 *California Forms of Pleading and Practice*, Ch. 380, *Negligence*, § 380.32[2][d], [5][c] (Matthew Bender)

16 *California Points and Authorities*, Ch. 165, *Negligence*, §§ 165.150, 165.241 (Matthew Bender)

600. Standard of Care

[A/An] [insert type of professional] is negligent if [he/she] fails to use the skill and care that a reasonably careful [insert type of professional] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”

[You must determine the level of skill and care that a reasonably careful [insert type of professional] would use in similar circumstances based only on the testimony of the expert witnesses[, including [name of defendant],] who have testified in this case.]

New September 2003; Revised October 2004, December 2007

Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence, for which CACI No. 501, *Standard of Care for Health Care Professionals*, should be used. See CACI No. 400, *Negligence—Essential Factual Elements*, for an instruction on the plaintiff’s burden of proof. The word “legal” or “professional” should be added before the word “negligence” in the first paragraph of CACI No. 400. (See *Sources and Authority* following CACI No. 500, *Medical Negligence—Essential Factual Elements*.)

Read the second paragraph if the standard of care must be established by expert testimony.

See CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

If the defendant is a specialist in his or her field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810 [121 Cal.Rptr. 194].) The standard of care for claims related to a specialist’s expertise is determined by expert testimony. (*Id.* at pp. 810–811.)

Whether an attorney-client relationship exists is a question of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756].)

If the evidence bearing upon this decision is in conflict, preliminary factual determinations are necessary. (*Ibid.*) Special instructions may need to be crafted for that purpose.

Sources and Authority

- “The elements of a cause of action in tort for professional negligence are (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional’s

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negligence.” (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433].)

- “Plaintiffs’ argument that CACI No. 600 altered their burden of proof is misguided in that it assumes that a ‘professional’ standard of care is inherently different than the standard in ordinary negligence cases. It is not. ‘With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional “circumstances’ relevant to an overall assessment of what constitutes “ordinary prudence” in a particular situation.’ ‘Since the standard of care remains constant in terms of “ordinary prudence,” it is clear that denominating a cause of action as one for “professional negligence” does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which “ordinary prudence” will be calculated and the defendant’s conduct evaluated.’ ” (*LAOSD Asbestos Cases* (2016) 5 Cal.App.5th 1022, 1050 [211 Cal.Rptr.3d 261], internal citation omitted.)
- “ ‘In addressing breach of duty, “the crucial inquiry is whether [the attorney’s] advice was so legally deficient when it was given that he [or she] may be found to have failed to use ‘such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.’ . . . ” . . . ’ ” (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710].)
- “[I]f the allegedly negligent conduct does not cause damage, it generates no cause of action in tort.” (*Moua v. Pittullo, Howington, Barker, Abernathy, LLP* (2014) 228 Cal.App.4th 107, 112–113 [174 Cal.Rptr.3d 662].)
- “[T]he issue of negligence in a legal malpractice case is ordinarily an issue of fact.” (*Blanks, supra*, 171 Cal.App.4th at p. 376.)
- “ ‘[T]he requirement that the plaintiff prove causation should not be confused with the method or means of doing so. Phrases such as “trial within a trial,” “case within a case,” . . . and “better deal” scenario describe methods of proving causation, not the causation requirement itself or the test for determining whether causation has been established.’ ” (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1091 [236 Cal.Rptr.3d 473].)
- “Plaintiffs argue that ‘laying pipe is not a “profession.” ’ However, case law, statutes, and secondary sources suggest that the scope of those held to a ‘professional’ standard of care—a standard of care similar to others in their profession, as opposed to that of a ‘reasonable person’—is broad enough to encompass a wide range of specialized skills. As a general matter, ‘[t]hose undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances, and failure to do so subjects them to liability for negligence.’ ” (*LAOSD Asbestos Cases, supra*, 5 Cal.App.5th at p. 1050.)
- “It is well settled that an attorney is liable for malpractice when his negligent

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investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313, 705 P.2d 886].)

- "[A] lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra*, 47 Cal.App.3d at p. 810.)
- "To establish a [professional] malpractice claim, a plaintiff is required to present expert testimony establishing the appropriate standard of care in the relevant community. 'Standard of care "is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations]" [Citation.]' " (*Quigley v. McClellan* (2013) 214 Cal.App.4th 1276, 1283 [154 Cal.Rptr.3d 719], internal citations omitted.)
- "California law does not require an expert witness to prove professional malpractice in all circumstances. 'In professional malpractice cases, expert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen.' " (*Ryan v. Real Estate of the Pacific, Inc.* (2019) 32 Cal.App.5th 637, 644–645 [244 Cal.Rptr.3d 129].)
- "Where . . . the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met." (*Wright, supra*, 47 Cal.App.3d at pp. 810–811, footnote and internal citations omitted.)
- "The standard is that of members of the profession 'in the same or a similar locality under similar circumstances' The duty encompasses both a knowledge of law and an obligation of diligent research and informed judgment." (*Wright, supra*, 47 Cal.App.3d at p. 809, internal citations omitted; but see *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470–471 [71 Cal.Rptr.3d 707] [geographical location may be a factor to be considered, but by itself, does not provide a practical basis for measuring similar circumstances].)
- Failing to Act Competently. Rules of Professional Conduct, rule 3-110.

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, §§ 290–293

4 Witkin, California Procedure (5th ed. 2008) Pleadings, § 593

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1124, 1125, 1128–1131

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 1-A, *Sources Of Regulation Of Practice Of Law In California-Overview*, ¶ 1:39 (The Rutter Group)

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Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶¶ 6:230–6:234 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.31 (Matthew Bender)

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, §§ 30.12, 30.13, Ch. 32, *Liability of Attorneys*, § 32.13 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.50, 76.51 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.50 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.20 et seq. (Matthew Bender)

**610. Affirmative Defense—Statute of Limitations—Attorney
Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)**

[Name of defendant] contends that *[name of plaintiff]*'s lawsuit was not filed within the time set by law. To succeed on this defense, *[name of defendant]* must prove that before *[insert date one year before date of filing]* *[name of plaintiff]* knew, or with reasonable diligence should have discovered, the facts of *[name of defendant]*'s alleged wrongful act or omission.

If, however, *[name of plaintiff]* proves

[Choose one or more of the following three options:]

[that *[he/she/it]* did not sustain actual injury until on or after *[insert date one year before date of filing]* [,/; or]]

[that on or after *[insert date one year before date of filing]* *[name of defendant]* continued to represent *[name of plaintiff]* regarding the specific subject matter in which the wrongful act or omission occurred [,/; or]]

[that on or after *[insert date one year before date of filing]* *[he/she/it]* was under a legal or physical disability that restricted *[his/her/its]* ability to file a lawsuit [,/;]]

the period within which *[name of plaintiff]* had to file the lawsuit is extended for the amount of time that *[insert tolling provision, e.g., [name of defendant] continued to represent [name of plaintiff]].*

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*, if the four-year limitation provision is at issue.

The court may need to define the term “actual injury” depending on the facts and circumstances of the particular case.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the “discovery” date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that he or she had suffered harm that was caused by someone’s wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.
- Persons Under Disabilities. Code of Civil Procedure section 352.
- “Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence.” (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- “Summary judgment was proper under section 340.6, subdivision (a)’s one-year limitations period only if the undisputed facts compel the conclusion that [plaintiff] was on inquiry notice of his claim more than one year before the complaint was filed. Inquiry notice exist where ‘the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.’ ‘A plaintiff need not be aware of the specific ‘facts’ necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.” [Citation.]’ ” (*Genisman v. Carley* (2018) 29 Cal.App.5th 45, 50–51 [239 Cal.Rptr.3d 780], internal citation omitted.)
- “ “[S]ubjective suspicion is not required. If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation.” [Citation.]’ ” (*Genisman, supra*, 29 Cal.App.5th at p. 51.)
- “For purposes of section 340.6, ‘actual injury occurs when the plaintiff sustains any loss or injury legally cognizable as damages in a legal malpractice action based on the acts or omissions that the plaintiff alleged.’ While ‘nominal damages will not end the tolling of section 340.6’s limitations period,’ it is ‘the fact of damage, rather than the amount, [that] is the critical factor.’ ” (*Genisman, supra*, 29 Cal.App.5th at p. 52, internal citation omitted.)
- “Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney’s error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences.” (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)
- “ [S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal

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malpractice.’ [T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff’s recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.’ On the other hand, ‘the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence’ because the plaintiff cannot allege actual injury resulted from an attorney’s malpractice.” (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)

- “[A]ctual injury exists even if the client has yet to ‘sustain[] all, or even the greater part, of the damages occasioned by his attorney’s negligence’; even if the client will encounter ‘difficulty in proving damages’; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, ‘actual injury’ does not include ‘speculative and contingent injuries . . . that do not yet exist . . .’ ” (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)
- “[B]ecause ‘determining actual injury is predominately a factual inquiry’ to the extent a question remains on this point, the matter is properly resolved by the trier of fact . . .” (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)
- “[W]here, as here, the ‘material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.’ ” (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at pp. 1037–1038.)
- “[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff’s malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor.” (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)
- “[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations.” (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)
- “[D]efendant, if he is to avail himself of the statute’s one-year-from-discovery limitation defense, has the burden of proving, under the ‘traditional allocation of the burden of proof’ that plaintiff discovered or should have discovered the facts alleged to constitute defendant’s wrongdoing more than one year prior to filing this action.” (*Samuels, supra*, 22 Cal.4th at pp. 8–9, internal citations omitted.)
- “In ordinary tort and contract actions, the statute of limitations, it is true, begins

to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- “We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action.” (*Neel, supra*, 6 Cal.3d at p. 194.)
- “[W]here there is a professional relationship, the degree of diligence in ferreting out the negligence for the purpose of the statute of limitations is diminished. [Citation.]” (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 315 [166 Cal.Rptr.3d 116].)
- “If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney’s negligence, the client cannot establish a cause of action for malpractice.” (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)
- “A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same ‘specific subject matter.’” (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at p. 1038.)
- “The continuous representation tolling provision in section 340.6, subdivision (a)(2) ‘was adopted in order to “avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.”’” (*Kelly v. Orr* (2016) 243 Cal.App.4th 940, 950 [196 Cal.Rptr.3d 901].)
- “The mere existence of an attorney-client relationship does not trigger the continuous representation rule: ‘Instead, the statute’s tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney’s subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, “[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated.*’” Tolling does not apply where there is a continuing relationship between the attorney and client ‘involving only unrelated matters.’” (*Lockton v. O’Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d

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392], original italics, internal citations omitted.)

- “[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term ‘attorney’ in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm.” (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)
- “ ‘[W]hen an attorney leaves a firm and takes a client with him or her, . . . the tolling in ongoing matters [does not] continue for claims against the former firm and partners.’ ” (*Stueve Bros. Farms, LLC, supra*, 222 Cal.App.4th at p. 314.)
- “ ‘Ordinarily, an attorney’s representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.’ ‘The rule is that, for purposes of the statute of limitations, the attorney’s representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.’ ‘Continuity of representation ultimately depends, not on the client’s subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.’ ” (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)
- “[T]he continuous representation tolling provision in section 340.6, subdivision (a)(2), applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee.” (*Kelly, supra*, 243 Cal.App.4th at p. 951.)
- “[A]bsent a statutory standard to determine when an attorney’s representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of . . . section 340.6, subdivision (a)(2), in the event of an attorney’s unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services*. . . . That may occur upon the attorney’s express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude*, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no*

reasonable expectation that the attorney will provide further legal services, however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney’s continuing representation, so the tolling should end. To this extent and for these reasons, we conclude that continuous representation should be viewed objectively from the client’s perspective . . .” (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- “Continuity of representation ultimately depends, not on the client’s subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship.” (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [208 Cal.Rptr.3d 428], original italics.)
- “Section 340.6, subdivision (a), states that ‘in no event’ shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute.” (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)
- “[T]he fourth tolling provision of section 340.6, subdivision (a)—that is, the provision applicable to legal and physical disabilities—encompasses the circumstances set forth in section 351 [exception, where defendant is out of the state].” (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569 [107 Cal.Rptr.3d 539].)
- “[A] would-be plaintiff is ‘imprisoned on a criminal charge’ within the meaning of section 352.1 if he or she is serving a term of imprisonment in the state prison.” (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 597 [230 Cal.Rptr.3d 528].)
- “In light of the Legislature’s intent that section 340.6(a) cover more than claims for legal malpractice, the term ‘professional services’ is best understood to include nonlegal services governed by an attorney’s professional obligations.” (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)
- “For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation.” (*Lee, supra*, 61 Cal.4th at p. 1238.)
- “*Lee* held that ‘section 340.6(a)’s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation

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in the course of providing professional services. In this context, a “professional obligation” is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.’ ” (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 292 [211 Cal.Rptr.3d 372].)

- “In sum, consistent with *Lee*, section 340.6(a) applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation.” (*Connelly v. Bornstein* (2019) 33 Cal.App.5th 783, 799 [245 Cal.Rptr.3d 452].)

Secondary Sources

3 Witkin, *California Procedure* (5th ed. 2008) Actions, §§ 573, 626–655

3 Levy et al., *California Torts*, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: *California Pretrial Civil Procedure*, Ch. 4, *Limitation of Actions*, 4.05

7 *California Forms of Pleading and Practice*, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 *California Forms of Pleading and Practice*, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

**611. Affirmative Defense—Statute of Limitations—Attorney
Malpractice—Four-Year Limit (Code Civ. Proc., § 340.6)**

[Name of defendant] contends that [name of plaintiff]’s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that [his/her/its] alleged wrongful act or omission occurred before [insert date four years before date of filing].

[If, however, [name of plaintiff] proves

[Choose one or more of the following four options:]

[that [he/she/it] did not sustain actual injury until on or after [insert date four years before date of filing]][, /; or]]

[that on or after [insert date four years before date of filing] [name of defendant] continued to represent [name of plaintiff] regarding the specific subject matter in which the wrongful act or omission occurred[, /; or]]

[that on or after [insert date four years before date of filing] [name of defendant] knowingly concealed the facts constituting the wrongful act or omission[, /; or]]

[that on or after [insert date four years before date of filing] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[, /;]]

the period within which [name of plaintiff] had to file the lawsuit is extended for the amount of time that [insert tolling provision, e.g., [name of defendant] knowingly concealed the facts].]

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the date on which the alleged wrongful act or omission occurred; (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the date on which the alleged wrongful act or omission occurred and determine whether the action is timely.

The court may need to define the term “actual injury” depending on the facts and circumstances of the particular case.

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Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.
- Persons Under Disabilities. Code of Civil Procedure section 352.
- “Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence.” (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- “Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney’s error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor.” (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)
- “ [S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.’ [T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff’s recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.’ On the other hand, ‘the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence’ because the plaintiff cannot allege actual injury resulted from an attorney’s malpractice.” (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)
- “[A]ctual injury exists even if the client has yet to ‘sustain[] all, or even the greater part, of the damages occasioned by his attorney’s negligence’; even if the client will encounter ‘difficulty in proving damages’; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, ‘actual injury’ does not include ‘speculative and contingent injuries . . . that do not yet exist . . .’ ” (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)
- “[B]ecause ‘determining actual injury is predominately a factual inquiry’ to the extent a question remains on this point, the matter is properly resolved by the trier of fact . . .” (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)

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- “[W]here, as here, the ‘material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.’ ” (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at pp. 1037–1038.)
- “[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff’s malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor.” (*Adams v. Paul* (1995) 11 Cal.4th 583, 598 fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)
- “[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations.” (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)
- “In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff’s ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client.” (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)
- “If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney’s negligence, the client cannot establish a cause of action for malpractice.” (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)
- “A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same ‘specific subject matter.’ ” (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra*, 238 Cal.App.4th at p. 1038.)
- “The continuous representation tolling provision in section 340.6, subdivision (a)(2) ‘was adopted in order to “avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.” ’ ” (*Kelly v. Orr* (2016) 243 Cal.App.4th 940, 950 [196 Cal.Rptr.3d 901].)
- “The mere existence of an attorney-client relationship does not trigger the continuous representation rule: ‘Instead, the statute’s tolling language addresses

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a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, "[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated.*" ' Tolling does not apply where there is a continuing relationship between the attorney and client 'involving only unrelated matters.' ” (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)

- “[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term ‘attorney’ in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm.” (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)
- “ ‘[W]hen an attorney leaves a firm and takes a client with him or her, . . . the tolling in ongoing matters [does not] continue for claims against the former firm and partners.’ ” (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 314 [166 Cal.Rptr.3d 116].)
- “ ‘Ordinarily, an attorney’s representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.’ ‘The rule is that, for purposes of the statute of limitations, the attorney’s representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.’ ‘Continuity of representation ultimately depends, not on the client’s subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.’ ” (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)
- “[T]he continuous representation tolling provision in section 340.6, subdivision (a)(2), applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee.” (*Kelly, supra*, 243 Cal.App.4th at p. 951.)
- “[A]bsent a statutory standard to determine when an attorney’s representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of . . . section 340.6, subdivision (a)(2), in the event of an attorney’s unilateral withdrawal or abandonment of the client, the representation ends *when the*

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client actually has or reasonably should have no expectation that the attorney will provide further legal services. . . . That may occur upon the attorney’s express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. After a client has no reasonable expectation that the attorney will provide further legal services, however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney’s continuing representation, so the tolling should end. To this extent and for these reasons, we conclude that continuous representation should be viewed objectively from the client’s perspective” (Laclette v. Galindo (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- “Continuity of representation ultimately depends, not on the client’s subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship.” (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [208 Cal.Rptr.3d 428], original italics.)
- “[T]he fourth tolling provision of section 340.6, subdivision (a)—that is, the provision applicable to legal and physical disabilities—encompasses the circumstances set forth in section 351 [exception, where defendant is out of the state].” (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569 [107 Cal.Rptr.3d 539].)
- “[A] would-be plaintiff is ‘imprisoned on a criminal charge’ within the meaning of section 352.1 if he or she is serving a term of imprisonment in the state prison.” (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 597 [230 Cal.Rptr.3d 528].)
- “In light of the Legislature’s intent that section 340.6(a) cover more than claims for legal malpractice, the term ‘professional services’ is best understood to include nonlegal services governed by an attorney’s professional obligations.” (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)
- “For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation.” (*Lee, supra*, 61 Cal.4th at p. 1238.)
- “*Lee* held that ‘section 340.6(a)’s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation

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in the course of providing professional services. In this context, a “professional obligation” is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.’ ” (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 292 [211 Cal.Rptr.3d 372].)

- “In sum, consistent with *Lee*, section 340.6(a) applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation.” (*Connelly v. Bornstein* (2019) 33 Cal.App.5th 783, 799 [245 Cal.Rptr.3d 452].)

Secondary Sources

3 Witkin, *California Procedure* (5th ed. 2008) Actions, §§ 573, 626–655

3 Levy et al., *California Torts*, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: *California Pretrial Civil Procedure*, Ch. 4, *Limitation of Actions*, § 4.05

7 *California Forms of Pleading and Practice*, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 *California Forms of Pleading and Practice*, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

1002. Extent of Control Over Premises Area

[Name of plaintiff] claims that [name of defendant] controlled the property involved in [name of plaintiff]’s harm, even though [name of defendant] did not own or lease it. A person controls property that he or she does not own or lease when he or she uses the property as if it were his or her own. A person is responsible for maintaining, in reasonably safe condition, all areas he or she controls.

New September 2003

Directions for Use

Use this instruction only for property that is not actually owned or leased by the defendant.

Sources and Authority

- “[A] defendant’s duty to maintain land in a reasonably safe condition extends to land over which the defendant exercises control, regardless of who owns the land. ‘As long as the defendant exercised control over the land, the location of the property line would not affect the defendant’s potential liability.’ ” (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 445 [241 Cal.Rptr.3d 616], internal citation omitted.)
- “[I]t is clear from [*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1167 [60 Cal.Rptr.2d 448, 929 P.2d 1239]] that simple maintenance of an adjoining strip of land owned by another does not constitute an exercise of control over that property. Although evidence of maintenance is considered ‘relevant on the issue of control,’ the court limited its holding by stating that ‘the simple act of mowing a lawn on adjacent property (or otherwise performing minimal, neighborly maintenance of property owned by another) generally will [not], standing alone, constitute an exercise of control over [the] property’ ” (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 198–199 [69 Cal.Rptr.2d 69].)
- “In *Alcaraz* . . . , our Supreme Court held that a landowner who exercises control over an adjoining strip of land has a duty to protect or warn others entering the adjacent land of a known hazard there. This duty arises even if the person does not own or exercise control over the hazard and even if the person does not own the abutting property on which the hazard is located. . . . [¶] The *Alcaraz* court concluded that such evidence was ‘sufficient to raise a triable issue of fact as to whether defendants exercised control over the strip of land containing the meter box and thus owed a duty of care to protect or warn plaintiff of the allegedly dangerous condition of the property.’ ” (*Contreras*, *supra*, 59 Cal.App.4th at pp. 197–198, footnote and internal citations omitted.)
- “ ‘ “The crucial element is control.” [Citation.]’ “[W]e have placed major

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importance on the existence of possession and control as a basis for tortious liability for conditions on the land.’ ” (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 414 [82 Cal.Rptr.3d 735], original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1225, 1226

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, §§ 15.02–15.03 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, §§ 381.03–381.04 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, § 334.52 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.15 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.60 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 16:2 (Thomson Reuters)

1004. Obviously Unsafe Conditions

If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/lessor/occupier/one who controls the property] does not have to warn others about the dangerous condition.

However, the [owner/lessor/occupier/one who controls the property] still must use reasonable care to protect against the risk of harm if it is foreseeable that the condition may cause injury to someone who because of necessity encounters the condition.

New September 2003; Revised May 2018

Directions for Use

Give this instruction with CACI No. 1001, *Basic Duty of Care*, if it is alleged that the condition causing injury was obvious. The first paragraph addresses the lack of a duty to warn of an obviously unsafe condition. (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 447 [221 Cal.Rptr.3d 701].)

The second paragraph addresses when there may be a duty to take some remedial action. Landowners may have a duty to take precautions to protect against the risk of harm from an obviously unsafe condition, even if they do not have a duty to warn. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121–122 [273 Cal.Rptr. 457].)

Sources and Authority

- “Foreseeability of harm is typically absent when a dangerous condition is open and obvious. ‘Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition.’ In that situation, owners and possessors of land are entitled to assume others will ‘perceive the obvious’ and take action to avoid the dangerous condition.” (*Jacobs, supra*, 14 Cal.App.5th at p. 447, internal citations omitted.)
- “[T]here may be situations ‘in which an obvious hazard, for which no warning is necessary, nonetheless gives rise to a duty on a landowner’s part to remedy the hazard because knowledge of the hazard is inadequate to prevent injury.’ This is so when, for example, the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that, under the circumstances, a person might choose to encounter the danger.” (*Johnson v. The Raytheon Co., Inc.* (2019) 33 Cal.App.5th 617, 632 [245 Cal.Rptr.3d 282], internal citation omitted.)
- “[I]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the

CACI No. 1004

apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to the defendant and consequences to the community of imposing a duty to remedy such danger may lead to the legal conclusion that the defendant ‘owes a duty of due care “to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.” ’ ” (*Osborn, supra*, 224 Cal.App.3d at p. 121, internal citation omitted.)

- “[W]hen a worker, whose work requires him or her to encounter a danger which is obvious or observable, is injured, ‘[t]he jury [is] entitled to balance the [plaintiff’s] necessity against the danger, even if it be assumed that it was an apparent one. This [is] a factual issue. [Citations.]’ In other words, under certain circumstances, an obvious or apparent risk of danger does not automatically absolve a defendant of liability for injury caused thereby.” (*Osborn, supra*, 224 Cal.App.3d at p. 118, original italics, internal citations omitted.)
- “[T]he obvious nature of a danger is not, in and of itself, sufficient to establish that the owner of the premises on which the danger is located is not liable for injuries caused thereby, and that although obviousness of danger may negate any duty to warn, it does not necessarily negate the duty to remedy.” (*Osborn, supra*, 224 Cal.App.3d at p. 119.)
- “The issue is whether there is any evidence from which a trier of fact could find that, as a practical necessity, [plaintiff] was foreseeably required to expose himself to the danger of falling into the empty pool.” (*Jacobs, supra*, 14 Cal.App.5th at p. 447.)
- In *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1039–1040 [43 Cal.Rptr.2d 158], the court found that an instruction stating that the defendant “owed no duty to warn plaintiff of a danger which was obvious or which should have been observed in the exercise of ordinary care” was proper: “The jury was free to consider whether Falcon was directly negligent in failing to correct any foreseeable, dangerous condition of the cables which may have contributed to the cause of Felmlee’s injuries.” (*Id.* at p. 1040.)
- “[T]he ‘obvious danger’ exception to a landowner’s ordinary duty of care is in reality a recharacterization of the former assumption of the risk doctrine, i.e., where the condition is so apparent that the plaintiff must have realized the danger involved, he assumes the risk of injury even if the defendant was negligent. . . . [T]his type of assumption of the risk has now been merged into comparative negligence.” (*Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 665 [20 Cal.Rptr.2d 148], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1267–1269

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.04[4]

CACI No. 1004

(Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, §§ 381.20, 381.32 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.14 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.25 et seq. (Matthew Bender)

1520. Abuse of Process—Essential Factual Elements

[Name of plaintiff] **claims that** [name of defendant] **wrongfully** [insert legal procedure, e.g., “took a deposition”]. **To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That** [name of defendant] [insert legal procedure, e.g., “took the deposition of [name of deponent]”];
 2. **That** [name of defendant] **intentionally used this legal procedure to** [insert alleged improper purpose that procedure was not designed to achieve];
 3. **That** [name of plaintiff] **was harmed; and**
 4. **That** [name of defendant]’s **conduct was a substantial factor in causing** [name of plaintiff]’s **harm.**
-

New September 2003

Sources and Authority

- “The common law tort of abuse of process arises when one uses the court’s process for a purpose other than that for which the process was designed. [Citations.] It has been ‘interpreted broadly to encompass the entire range of “procedures” incident to litigation.’ [Citation.] [¶] ‘[T]he essence of the tort [is] . . . misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.’ [Citation.]” (*S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 41 [176 Cal.Rptr.3d 567].)
- “To establish a cause of action for abuse of process, a plaintiff must plead two essential elements: that the defendant (1) entertained an ulterior motive in using the process and (2) committed a wilful act in a wrongful manner.” (*Coleman v. Gulf Insurance Group* (1986) 41 Cal.3d 782, 792 [226 Cal.Rptr. 90, 718 P.2d 77], internal citations omitted.)
- “A cause of action for abuse of process cannot be viable absent some harm to the plaintiff caused by the abuse of process.” (*Yee v. Superior Court* (2019) 31 Cal. App. 5th 26, 37 [242 Cal.Rptr.3d 439].)
- “[Plaintiff]’s complaint indicates that he has pleaded the tort of abuse of process, long recognized at common law but infrequently utilized.” (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1463 [246 Cal.Rptr. 815], internal citation omitted.)
- “Abuse of process is not just another name for malicious prosecution. *Simply filing or maintaining a lawsuit for an improper purpose* (such as might support a malicious prosecution cause of action) *is not abuse of process.* [Citation.] [¶]

Malicious prosecution and abuse of process are distinct. The former concerns a meritless lawsuit (and all the damage it inflicted). The latter *concerns the misuse of the tools the law affords litigants once they are in a lawsuit* (regardless of whether there was probable cause to commence that lawsuit in the first place). Hence, abuse of process claims typically arise for improper or excessive attachments [citation] or improper use of discovery [citation].” (S.A., *supra*, 229 Cal.App.4th at pp. 41–42, original italics.)

- “[W]hile a defendant’s act of improperly instituting or maintaining an action may, in an appropriate case, give rise to a cause of action for malicious prosecution, the mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action.” (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1523 [141 Cal.Rptr.3d 338].)
- “Some definite act or threat not authorized by the process or aimed at an objective not legitimate in the use of the process is required. And, generally, an action lies only where the process is used to obtain an unjustifiable collateral advantage. For this reason, mere vexation [and] harassment are not recognized as objectives sufficient to give rise to the tort.” (*Younger v. Solomon* (1974) 38 Cal.App.3d 289, 297 [113 Cal.Rptr. 113], internal citations omitted.)
- “Process is action taken pursuant to judicial authority. It is not action taken without reference to the power of the court.” (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 530 [3 Cal.Rptr.2d 49].)
- “This broad reach of the ‘abuse of process’ tort can be explained historically, since the tort evolved as a ‘catch-all’ category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution.” (*Younger, supra*, 38 Cal.App.3d at p. 296, internal citations omitted.)
- “ ‘The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.’ ” (*Spellens v. Spellens* (1957) 49 Cal.2d 210, 232–233 [317 P.2d 613], internal citation omitted.)
- “[A]n improper purpose may consist in achievement of a benefit totally extraneous to or of a result not within its legitimate scope. Mere ill will against the adverse party in the proceedings does not constitute an ulterior or improper motive.” (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 876 [168 Cal.Rptr. 361], internal citations omitted.)
- “Merely obtaining or seeking process is not enough; there must be subsequent abuse, by a misuse of the judicial process for a purpose other than that which it was intended to serve. The gist of the tort is the improper use of the process after it is issued.” (*Adams, supra*, 2 Cal.App.4th at pp. 530–531, internal citations omitted.)
- “ ‘ ‘Some definite act or threat not authorized by the process, or aimed at an

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objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.” ’ ” (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 524 [154 Cal.Rptr. 874], internal citations omitted.)

- “[I]t is consistent with the purpose of section 47, subdivision (2) to exempt malicious prosecution while still applying the privilege to abuse of process causes of action.” (*Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, 824 [266 Cal.Rptr. 360].)
- “[T]he scope of ‘publication or broadcast’ includes noncommunicative conduct like the filing of a motion for a writ of sale, the filing of assessment liens, or the filing of a mechanic’s lien. The privilege also applies to conduct or publications occurring outside the courtroom, to conduct or publications which are legally deficient for one reason or another, and even to malicious or fraudulent conduct or publications.” (*O’Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134 [100 Cal.Rptr.2d 602], internal citations omitted.)
- “The use of the machinery of the legal system for an ulterior motive is a classic indicia of the tort of abuse of process. However, the tort requires abuse of legal process, not just filing suit.” (*Trear v. Sills* (1999) 69 Cal.App.4th 1341, 1359 [82 Cal.Rptr.2d 281], internal citations omitted.)
- “We have located no authority extending the tort of abuse of process to administrative proceedings. Application of the tort to administrative proceedings would not serve the purpose of the tort, which is to preserve the integrity of the court.” (*Stolz v. Wong Communications Ltd. Partnership* (1994) 25 Cal.App.4th 1811, 1822–1823 [31 Cal.Rptr.2d 229], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 611–622

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, §§ 43.20–43.25 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.51 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.70 et seq. (Matthew Bender)

1700. Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[Name of plaintiff] claims that *[name of defendant]* harmed *[him/her]* by making **[one or more of]** the following statement(s): *[list all claimed per se defamatory statements]*. To establish this claim, *[name of plaintiff]* must prove that all of the following are more likely true than not true:

Liability

1. That *[name of defendant]* made **[one or more of]** the statement(s) to **[a person/persons]** other than *[name of plaintiff]*;
2. That **[this person/these people]** reasonably understood that the statement(s) **[was/were]** about *[name of plaintiff]*;
3. **[That [this person/these people] reasonably understood the statement(s) to mean that [insert ground(s) for defamation per se, e.g., “[name of plaintiff] had committed a crime”]]**; and
4. That the statement(s) **[was/were]** false.

In addition, *[name of plaintiff]* must prove by clear and convincing evidence that *[name of defendant]* knew the statement(s) **[was/were]** false or had serious doubts about the truth of the statement(s).

Actual Damages

If *[name of plaintiff]* has proved all of the above, then *[he/she]* is entitled to recover **[his/her]** actual damages if *[he/she]* proves that *[name of defendant]*'s wrongful conduct was a substantial factor in causing any of the following:

- a. Harm to *[name of plaintiff]*'s property, business, trade, profession, or occupation;
- b. Expenses *[name of plaintiff]* had to pay as a result of the defamatory statements;
- c. Harm to *[name of plaintiff]*'s reputation; or
- d. Shame, mortification, or hurt feelings.

Assumed Damages

Even if *[name of plaintiff]* has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law nonetheless assumes that *[he/she]* has suffered this harm. Without presenting evidence of damage, *[name of plaintiff]* is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.

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Punitive Damages

[*Name of plaintiff*] **may also recover damages to punish** [*name of defendant*] **if [he/she] proves by clear and convincing evidence that** [*name of defendant*] **acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.*]

New September 2003; Revised April 2008, June 2016, December 2016, January 2018

Directions for Use

Special verdict form CACI No. VF-1700, *Defamation per se (Public Officer/Figure and Limited Public Figure)*, should be used in this type of case.

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is “unprivileged.” (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the “unprivileged” element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the “unprivileged” element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

Sources and Authority

- Defamation. Civil Code section 44.
- Libel Defined. Civil Code section 45.
- Libel per se. Civil Code section 45a.
- Slander Defined. Civil Code section 46.

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- “Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage.” (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486 [183 Cal.Rptr.3d 867].)
- “The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. ‘In general, . . . a written communication that is false, that is not protected by any privilege, and that exposes a person to contempt or ridicule or certain other reputational injuries, constitutes libel.’ The defamatory statement must specifically refer to, or be “of [or] concerning,” the plaintiff.” (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1259 [217 Cal.Rptr.3d 234], internal citations omitted.)
- “ ‘A statement is defamatory when it tends “directly to injure [a person] in respect to [that person’s] office, profession, trade or business, either by imputing to [the person] general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to [the person’s] office, profession, trade, or business that has a natural tendency to lessen its profits.” ’ ” (*Issa v. Applegate* (2019) 31 Cal.App.5th 689, 702 [242 Cal.Rptr.3d 809], internal citation omitted.)
- “In a case in which a plaintiff seeks to maintain an action for defamation by implication, the plaintiff must demonstrate that (1) his or her interpretation of the statement is reasonable; (2) the implication or implications to be drawn convey defamatory facts, not opinions; (3) the challenged implications are not “substantially true” ’; and (4) the identified reasonable implications could also be reasonably deemed defamatory.” (*Issa, supra*, 31 Cal.App.5th at p. 707.)
- “ ‘If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence . . . , that the libelous statement was made with “ ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” ’ ‘The rationale for such differential treatment is, first, that the public figure has greater access to the media and therefore greater opportunity to rebut defamatory statements, and second, that those who have become public figures have done so voluntarily and therefore “invite attention and comment.” ’ ” (*Jackson, supra*, 10 Cal.App.5th at p. 1259, footnotes and internal citations omitted.)
- “[S]tatements cannot form the basis of a defamation action if they cannot be reasonably interpreted as stating actual facts about an individual. Thus, rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions of contempt and language used in a loose, figurative sense will not support a defamation action.” (*Grenier, supra*, 234 Cal.App.4th at p. 486.)
- “ ‘ “If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject’s reputation in any of the enumerated respects, then there is no libel at all. If such a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own

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intelligence and common sense, then . . . there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then . . . the libel cannot be libel per se but will be libel per quod,” requiring pleading and proof of special damages.’ ” (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351–352 [192 Cal.Rptr.3d 511].)

- “A slander that falls within the first four subdivisions of Civil Code section 46 is slander per se and requires no proof of actual damages. A slander that does not fit into those four subdivisions is slander per quod, and special damages are required for there to be any recovery for that slander.” (*The Nethercutt Collection v. Regalia* (2009) 172 Cal.App.4th 361, 367 [90 Cal.Rptr.3d 882], internal citations omitted.)
- “With respect to slander per se, the trial court decides if the alleged statement falls within Civil Code section 46, subdivisions 1 through 4. It is then for the trier of fact to determine if the statement is defamatory. This allocation of responsibility may appear, at first glance, to result in an overlap of responsibilities because a trial court determination that the statement falls within those categories would seemingly suggest that the statement, if false, is necessarily defamatory. But a finder of fact might rely upon extraneous evidence to conclude that, under the circumstances, the statement was not defamatory.” (*The Nethercutt Collection, supra*, 172 Cal.App.4th at pp. 368–369.)
- “[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury ‘also may award plaintiff presumed general damages.’ Presumed damages ‘are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.’ [¶] . . . [¶] . . . [T]he instant instruction, which limits damages to ‘those damages that necessarily result from the publication of defamatory matter,’ constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, ‘if obeyed, did not allow the jurors to “enter the realm of speculation” regarding future suffering.’ ” (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

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- “In defamation actions generally, factual truth is a defense which it is the defendant’s burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff. As a matter of constitutional law, therefore, media statements on matters of public interest, including statements of opinion which reasonably imply a knowledge of facts, ‘must be provable as false before there can be liability under state defamation law.’ ” (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802], internal citations omitted.)
- In matters involving public concern, the First Amendment protection applies to nonmedia defendants, putting the burden of proving falsity of the statement on the plaintiff. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)
- “Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the ‘public’ at large; communication to a single individual is sufficient.” (*Smith, supra*, 72 Cal.App.4th at p. 645, internal citations omitted.)
- “[W]hen a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor.” (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26 [80 Cal.Rptr.2d 1], internal citation omitted.)
- “At common law, one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim. California has adopted the common law in this regard, although by statute the republication of defamatory statements is privileged in certain defined situations.” (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 268 [79 Cal.Rptr.2d 178, 965 P.2d 696], internal citations omitted.)
- The general rule is that “a plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant.” There is an exception to this rule. [When it is foreseeable that the plaintiff] “ ‘will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its contents.’ ” (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198], internal citations omitted.)
- Whether a plaintiff in a defamation action is a public figure is a question of law for the trial court. (*Reader’s Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252 [208 Cal.Rptr. 137, 690 P.2d 610].)
- “To qualify as a limited purpose public figure, a plaintiff ‘must have undertaken some voluntary [affirmative] act[ion] through which he seeks to influence the resolution of the public issues involved.’ ” (*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190 [31 Cal.Rptr.2d 193]; see also *Mosesian v. McClatchy*

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Newspapers (1991) 233 Cal.App.3d 1685, 1689 [285 Cal.Rptr. 430].)

- “Characterizing a plaintiff as a limited purpose public figure requires the presence of certain elements. First, there must be a public controversy about a topic that concerns a substantial number of people. In other words, the issue was publicly debated. Second, the plaintiff must have voluntarily acted to influence resolution of the issue of public interest. To satisfy this element, the plaintiff need only attempt to thrust himself or herself into the public eye. Once the plaintiff places himself or herself in the spotlight on a topic of public interest, his or her private words and acts relating to that topic become fair game. However, the alleged defamation must be germane to the plaintiff’s participation in the public controversy.” (*Grenier, supra*, 234 Cal.App.4th at p. 484, internal citations omitted.)
- “The First Amendment limits California’s libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with ‘knowledge that it was false or with reckless disregard of whether it was false or not.’ Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author ‘in fact entertained serious doubts as to the truth of his publication,’ or acted with a ‘high degree of awareness of . . . probable falsity.’ ” (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 510 [111 S.Ct. 2419, 115 L.Ed.2d 447], internal citations omitted; see *St. Amant v. Thompson* (1968) 390 U.S. 727, 731 [88 S.Ct. 1323, 20 L.Ed.2d 262]; *New York Times v. Sullivan* (1964) 376 U.S. 254, 279–280 [84 S.Ct. 710, 11 L.Ed.2d 686].)
- The *New York Times v. Sullivan* standard applies to private individuals with respect to presumed or punitive damages if the statement involves a matter of public concern. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 349 [94 S.Ct. 2997, 41 L.Ed.2d 789].)
- “California . . . permits defamation liability so long as it is consistent with the requirements of the United States Constitution.” (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1359 [78 Cal.Rptr.2d 627], citing *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 740–742 [257 Cal.Rptr. 708, 771 P.2d 406].)
- “Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. . . . In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.” (*Masson, supra*, 501 U.S. at pp. 510–511, internal citations omitted.)
- Actual malice “does not require that the reporter hold a devout belief in the truth of the story being reported, only that he or she refrain from either reporting a story he or she knows to be false or acting in reckless disregard of the truth.” (*Jackson, supra*, 68 Cal.App.4th at p. 35.)

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- “The law is clear [that] the recklessness or doubt which gives rise to actual or constitutional malice is subjective recklessness or doubt.” (*Melaleuca, Inc.*, *supra*, 66 Cal.App.4th at p. 1365.)
- To show reckless disregard, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.” (*St. Amant, supra*, 390 U.S. at p. 731.)
- “ ‘A defamation plaintiff may rely on inferences drawn from circumstantial evidence to show actual malice. [Citation.] ‘A failure to investigate [fn. omitted] [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.’ ” (*Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 873 [162 Cal.Rptr.3d 188].)
- “ ‘ “[Evidence] of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant’s recklessness or of his knowledge of falsity.” [Citations.] A failure to investigate [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication. [¶] We emphasize that such evidence is relevant only to the extent that it reflects on the subjective attitude of the publisher. [Citations.] The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy. [Citations.] Similarly, mere proof of ill will on the part of the publisher may likewise be insufficient. [Citation.] ’ ” (*Young v. CBS Broadcasting, Inc.* (2012) 212 Cal.App.4th 551, 563 [151 Cal.Rptr.3d 237], quoting *Reader’s Digest Assn., supra*, 37 Cal.3d at pp. 257–258, footnote omitted.)
- “An entity other than a natural person may be libeled.” (*Live Oak Publishing Co., supra*, 234 Cal.App.3d at p. 1283.)
- “A political challenger must be afforded leeway to characterize the conduct of his opponent, even if such characterization takes the most negative perspective, in order to ensure ‘uninhibited, robust, and wide-open’ debate on public issues. Again, ‘[h]yperbole, distortion, invective, and tirades’ are ‘a part of American politics,’ and while providing protection for such speech may allow ‘candidates and their supporters to express . . . the most vile sentiments,’ it is nevertheless necessary in order to ensure the ‘opportunity to criticize and comment upon government and the issues of the day.’ ” (*Issa, supra*, 31 Cal.App.5th at p. 709, internal citation omitted.)

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Secondary Sources

9 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 705–718

Chin, et al., California Practice Guide: Employment Litigation, Ch. 5(I)-D, *Employment Torts And Related Claims—Defamation*, ¶¶ 5:472, 5:577 (The Rutter Group)

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.10 et seq. (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.24–142.27 (Matthew Bender)

California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:44–21:52 (Thomson Reuters)

1707. Fact Versus Opinion

For [name of plaintiff] to recover, [name of defendant]’s statement(s) must have been [a] statement(s) of fact, not opinion. A statement of fact is one that can be proved to be true or false. In some circumstances, [name of plaintiff] may recover if a statement phrased as an opinion implies that a false statement of fact is true.

In deciding this issue, you should consider whether the average [reader/listener] would conclude from the language of the statement and its context that [name of defendant] was implying that a false statement of fact is true.

New September 2003; Revised June 2013

Directions for Use

Give this instruction only if the court concludes that a statement could reasonably be construed as implying a false assertion of fact. (See *Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 578 [51 Cal.Rptr.2d 891].)

Sources and Authority

- “ ‘Because [a defamatory] statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [Citation.]’ That does not mean that statements of opinion enjoy blanket protection. On the contrary, where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation. The ‘crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. [Citation.]’ ‘Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood. [Citations.]’ ” (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 695–696 [142 Cal.Rptr.3d 40], internal citations omitted.)
- “ ‘In determining whether a statement is libelous we look to what is explicitly stated as well as what insinuation and implication can be reasonably drawn from the communication.’ “ ‘[I]f the defendant juxtaposes [a] series of facts so as to imply a defamatory connection between them, or [otherwise] creates a defamatory implication . . . he may be held responsible for the defamatory implication, . . . even though the particular facts are correct.’ ” The ‘pertinent question’ is whether a ‘reasonable fact finder’ could conclude that the statements ‘as a whole, or any of its parts, directly made or sufficiently implied a false assertion of defamatory fact that tended to injure’ plaintiff’s reputation.”

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(*Issa v. Applegate* (2019) 31 Cal.App.5th 689, 703 [242 Cal.Rptr.3d 809], internal citations omitted.)

- “In defining libel and slander, Civil Code sections 45 and 46 both refer to a ‘false . . . publication . . .’ This statutory definition can be meaningfully applied only to statements that are capable of being proved as false or true.” (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305].)
- “Thus, ‘rhetorical hyperbole,’ ‘vigorous epithet[s],’ ‘lusty and imaginative expressions[s] of . . . contempt,’ and language used ‘in a loose, figurative sense’ have all been accorded constitutional protection.” (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401 [88 Cal.Rptr.2d 843].)
- “Deprecatory statements regarding the merits of litigation are “nothing more than ‘the predictable opinion’ of one side to the lawsuit” and cannot be the basis for a defamation claim.” (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 156 [162 Cal.Rptr.3d 831].)
- “If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.” (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18 [110 S.Ct. 2695, 111 L.Ed.2d 1].)
- “[W]hen a communication identifies non-defamatory facts underlying an opinion, or the recipient is otherwise aware of those facts, a negative statement of opinion is not defamatory. As explained in the Restatement Second of Torts, a ‘pure type of expression of opinion’ occurs ‘when both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts and does not imply the existence of other facts in order to justify the comment. The assumption of the facts may come about because someone else has stated them or because they were assumed by both parties as a result of their notoriety or otherwise.’ Actionable statements of opinion are ‘the mixed type, [where] an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant [but] gives rise to the inference that there are undisclosed facts that justify the forming of the opinion.’ ” (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1314 [206 Cal.Rptr.3d 60], internal citation omitted.)
- “Even if an opinion can be understood as implying facts capable of being proved true or false, however, it is not actionable if it also discloses the underlying factual bases for the opinion and those statements are true.” (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 100 [201 Cal.Rptr.3d 782].)
- “California courts have developed a ‘totality of the circumstances’ test to determine whether an alleged defamatory statement is one of fact or of opinion.

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First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense. Where the language of the statement is ‘cautiously phrased in terms of apparency,’ the statement is less likely to be reasonably understood as a statement of fact rather than opinion.” (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260 [228 Cal.Rptr. 206, 721 P.2d 87].)

- “The court must put itself in the place of an average reader and decide the natural and probable effect of the statement.” (*Hofmann Co. v. E.I. Du Pont de Nemors & Co.* (1988) 202 Cal.App.3d 390, 398 [248 Cal.Rptr. 384].)
- “[S]ome statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. ‘In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion’ ” (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244], internal citations omitted.)
- “Use of ‘hyperbolic, informal’ ‘“crude, [or] ungrammatical” language, satirical tone, [or] vituperative, “juvenile name-calling” ’ provide support for the conclusion that offensive comments were nonactionable opinion. Similarly, overly vague statements, and ‘“generalized” comments . . . “lack[ing] any specificity as to the time or place of” alleged conduct may be a “further signal to the reader there is no factual basis for the accusations.” ’ On the other hand, if a statement is ‘factually specific,’ ‘earnest,’ or ‘serious’ in tone, or the speaker ‘represents himself as “unbiased,” ’ ‘“having specialized” ’ or ‘“first-hand experience,” ’ or ‘“hav[ing] personally witnessed . . . abhorrent behavior” ’, this may signal the opposite, rendering the statement actionable.” (*ZL Technologies, Inc. v. Does 1–7* (2017) 13 Cal.App.5th 603, 624 [220 Cal.Rptr.3d 569], internal citations omitted.)
- “Whether a challenged statement ‘declares or implies a provable false assertion of fact is a question of law for the court to decide . . . , unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood.’ ” (*Overhill Farms, Inc. v. Lopez* (2010) 190 Cal.App.4th 1248, 1261 [119 Cal.Rptr.3d 127].)
- “We next turn to the broader context of his statements—posting on an Internet site under an assumed user name. [Defendant] contends Internet fora are notorious as ‘places where readers expect to see strongly worded opinions rather than objective facts,’ and that ‘anonymous, or pseudonymous,’ opinions should be ‘“discount[ed] . . . accordingly.” ’ However, the mere fact speech is broadcast across the Internet by an anonymous speaker does not ipso facto make it nonactionable opinion and immune from defamation law.” (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 429 [160 Cal.Rptr.3d 423], internal citation omitted.)
- “Rather, a defendant’s anonymity, the name of the Internet forum, the nature, language, tone, and complete content of the remarks all are relevant.” (*ZL Technologies, Inc., supra*, 13 Cal.App.5th at p. 625.)

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Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 643–646

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.05–45.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.16 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.86 (Matthew Bender)

California Civil Practice: Torts §§ 21:20–21:21 (Thomson Reuters)

**1821. Damages for Use of Name or Likeness (Civ. Code
§ 3344(a))**

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called “damages.”

[Name of plaintiff] must prove the amount of [his/her] damages. [Name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

- 1. [Humiliation, embarrassment, and mental distress, including any physical symptoms;]**
- 2. [Harm to [name of plaintiff]’s reputation;] [and]**
- 3. [Insert other item(s) of claimed harm].**

In addition, [name of plaintiff] may recover any profits that [name of defendant] received from the use of [name of plaintiff]’s [name/voice/signature/photograph/likeness] [that have not already been taken into account with regard to the above damages]. To establish the amount of these profits you must:

- 1. Determine the gross, or total, revenue that [name of defendant] received from the use;**
- 2. Determine the expenses that [name of defendant] had in obtaining the gross revenue; and**
- 3. Deduct [name of defendant]’s expenses from the gross revenue.**

[Name of plaintiff] must prove the amount of gross revenue, and [name of defendant] must prove the amount of expenses.

New September 2003; Revised June 2012, December 2012

Directions for Use

Under Civil Code section 3344(a), an injured party may recover either actual damages or \$750, whichever is greater, as well as profits from the unauthorized use that were not taken into account in calculating actual damages. (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 [135 Cal.Rptr.3d 200].) If no actual damages are sought, the first part of the instruction may be deleted or modified to simply instruct the jury to award \$750 if it finds liability.

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The plaintiff might claim that he or she would have earned the same profits that the defendant wrongfully earned. In such a case, to avoid a double recovery, the advisory committee recommends computing damages to recover the defendant's wrongful profits separately from actual damages, that is, under the second part of the instruction and not under actual damages item 3 ("other item(s) of claimed harm"). See also CACI No. VF-1804, *Privacy—Use of Name or Likeness*. Give the bracketed phrase in the paragraph that introduces the second part of the instruction if the plaintiff alleges lost profits that are different from the defendant's wrongful profits and that are claimed under actual damages item 3.

Sources and Authority

- Liability for Use of Name or Likeness. Civil Code section 3344.
- “[Plaintiff] alleges, and submits evidence to show, that he was injured economically because the ad will make it difficult for him to endorse other automobiles, and emotionally because people may be led to believe he has abandoned his current name and assume he has renounced his religion. These allegations suffice to support his action. Injury to a plaintiff’s right of publicity is not limited to present or future economic loss, but ‘may induce humiliation, embarrassment, and mental distress.’ ” (*Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 416, internal citation omitted.)
- “The statutory language of section 3344 is unambiguous—the plaintiff bears the burden of presenting proof of the gross revenue attributable to the defendant’s unauthorized use of the plaintiff’s likeness, and the defendant must then prove its deductible expenses. CACI No. 1821 mirrors the language of section 3344: ‘[plaintiff] must prove the amount of gross revenue, and [. . . defendant] must prove the amount of expenses.’ (CACI No. 1821.)” (*Olive v. General Nutrition Centers, Inc.* (2018) 30 Cal.App.5th 804, 814 [242 Cal.Rptr.3d 15], internal citation omitted.)
- “CACI No. 1821 adequately explained the applicable law to the jury.” (*Olive, supra*, 30 Cal.App.5th at p. 815.)
- “We can conceive no rational basis for the Legislature to limit the \$750 as an alternative to all other damages, including profits. If someone profits from the unauthorized use of another’s name, it makes little sense to preclude the injured party from recouping those profits because he or she is entitled to statutory damages as opposed to actual damages. Similar reasoning appears to be reflected in the civil jury instructions for damages under section 3344, which provides: ‘If [name of plaintiff] has not proved the above damages, or has proved an amount of damages less than \$750, then you must award [him/her] \$750. [¶] In addition, [name of plaintiff] may recover any profits that [name of defendant] received from the use of [name of plaintiff]’s [name . . .] [that have not already been taken into account in computing the above damages].’ (CACI No. 1821, italics omitted.)” (*Orthopedic Systems, Inc., supra*, 202 Cal.App.4th at p. 546.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1715–1724

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-K, *Invasion Of Privacy*, ¶¶ 5:710–5:891 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.13 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.35 (Matthew Bender)

California Civil Practice, Torts § 20:17 (Thomson Reuters)

**2521A. Work Environment Harassment—Conduct Directed at
Plaintiff—Essential Factual Elements—Employer or Entity
Defendant (Gov. Code, §§ 12923, 12940(j))**

[Name of plaintiff] claims that [he/she] was subjected to harassment based on [his/her] [describe protected status, e.g., race, gender, or age] at [name of defendant] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.

To establish this claim, [name of plaintiff] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.

- 1. That [name of plaintiff] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [name of defendant];**
- 2. That [name of plaintiff] was subjected to harassing conduct because [he/she] was [protected status, e.g., a woman];**
- 3. That the harassing conduct was severe or pervasive;**
- 4. That a reasonable [e.g., woman] in [name of plaintiff]’s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 5. That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 6. [Select applicable basis of defendant’s liability:]**
[That a supervisor engaged in the conduct;]
[or]
[That [name of defendant] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]
- 7. That [name of plaintiff] was harmed; and**
- 8. That the conduct was a substantial factor in causing [name of plaintiff]’s harm.**

*Derived from former CACI No. 2521 December 2007; Revised June 2013,
December 2015, May 2018, July 2019*

Directions for Use

This instruction is for use in a hostile work environment case when the defendant

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is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*. For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of “supervisor,” see CACI No. 2525, *Harassment—“Supervisor” Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

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- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “[A]n employer is strictly liable for all acts of sexual harassment by a supervisor.” (*State Dep’t of Health Servs.*, *supra*, 31 Cal.4th at p. 1042.)
- “The applicable language of the FEHA does not suggest that an employer’s liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee ‘other than an agent,’ ‘not acting as the employer’s agent,’ or ‘not acting within the scope of an agency for the employer.’ By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment ‘by an employee other than an agent *or supervisor*’ (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer’s agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services*, *supra*, 31 Cal.4th at p. 1041, original italics.)
- “When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action).” (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.3d 464].)
- “If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no ‘unlawful employment practice’ that the FEHA governs.” (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083],

called into doubt on other grounds by statute.)

- “[I]n order for the employer to avoid strict liability for the supervisor’s actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor’s actions regardless of whether the supervisor was acting as the employer’s agent.” (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)
- Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether “agent” language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)
- “Here, [defendant] was jointly liable with its employees on a respondeat superior or vicarious liability theory on every cause of action in which it was named as a defendant.” (*Bihun, supra*, 13 Cal.App.4th at p. 1000.)
- “The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]’s harassment claim either. Since ‘there is no possible justification for harassment in the workplace,’ an employer cannot offer a legitimate nondiscriminatory reason for it.” (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)
- “[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment.’ ” (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)
- “When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ the law is violated.” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: ‘[N]ot all workplace conduct that may be described as “harassment” affects a “term, condition, or privilege” of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive “to alter the conditions of [the victim’s] employment and create an abusive working environment.” ’ . . . ‘Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title

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VII violation.’ . . . California courts have adopted the same standard in evaluating claims under the FEHA.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- “To be actionable, ‘a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.’ That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff’s position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so.” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)
- “The stray remarks doctrine . . . allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by ‘nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.’ [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, ‘the task of disambiguating ambiguous utterances is for trial, not for summary judgment.’ Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury.” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted.)
- “[I]n reviewing the trial court’s grant of [defendant]’s summary judgment motion, the Court of Appeal properly considered evidence of alleged discriminatory comments made by decision makers and coworkers along with all other evidence in the record.” (*Reid, supra*, 50 Cal.4th at p. 545.)
- “[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be.” (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286 [100 Cal.Rptr.3d 296].)
- “In contending that the ‘subjectively offensive’ element was not proven, a defendant ‘will assert that a plaintiff consented to the conduct through active participation in it, or was not injured because the plaintiff did not subjectively find it abusive.’ [¶] [Evidence Code] Section 1106 limits the evidence the defendant may use to support this assertion. It provides that ‘[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff’s sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff’ This general rule is, however, subject to the exception that it ‘does not apply to evidence of the plaintiff’s sexual conduct

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with the alleged perpetrator.’ The term ‘sexual conduct’ within the meaning of section 1106 has been broadly construed to include ‘all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff’s willingness to engage in sexual activity,’ including ‘racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits.’ ” (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874 [235 Cal.Rptr.3d 161], internal citations omitted.)

- “[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.” (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)
- “Under . . . FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*.” (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [169 Cal.Rptr.3d 794], original italics.)
- “[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. ‘[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.’ Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment.” (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)
- “The plaintiff must show that the harassing conduct took place because of the plaintiff’s sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant’s bias against women; she need not show that it was because of the defendant’s sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender.” (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)
- “[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest.” (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239–1240 [166 Cal.Rptr.3d 676].)
- “A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: ‘For purposes of this subdivision, “harassment” because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire.*’ ” (*Lewis, supra*, 224 Cal.App.4th at p. 1527 fn. 8, original italics.)
- “California courts have held so-called ‘me too’ evidence, that is, evidence of gender bias against employees other than the plaintiff, may be admissible

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evidence in discrimination and harassment cases.” (*Meeks, supra*, 24 Cal.App.5th at p. 871.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment*, ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

**2521B. Work Environment Harassment—Conduct Directed at
Others—Essential Factual Elements—Employer or Entity
Defendant (Gov. Code, §§ 12923, 12940(j))**

[Name of plaintiff] **claims that coworkers at *[name of defendant]* were subjected to harassment based on *[describe protected status, e.g., race, gender, or age]* and that this harassment created a work environment for *[name of plaintiff]* that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, *[name of plaintiff]* must prove all of the following:

- 1. That *[name of plaintiff]* was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] *[name of defendant]*;**
- 2. That *[name of plaintiff]*, although not personally subjected to harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**
- 3. That the harassing conduct was severe or pervasive;**
- 4. That a reasonable *[describe member of protected group, e.g., woman]* in *[name of plaintiff]*'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 5. That *[name of plaintiff]* considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward *[e.g., women]*;**
- 6. *[Select applicable basis of defendant's liability:]*
[That a supervisor engaged in the conduct;]
[or]
[That *[name of defendant]* [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**
- 7. That *[name of plaintiff]* was harmed; and**
- 8. That the conduct was a substantial factor in causing *[name of plaintiff]*'s harm.**

*Derived from former CACI No. 2521 December 2007; Revised June 2013,
December 2015, May 2018, July 2019*

CACI No. 2521B

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No. 2521C, *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of “supervisor,” see CACI No. 2525, *Harassment—“Supervisor” Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

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- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “The plaintiff’s work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman’s perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers.” (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- “Harassment against others in the workplace is only relevant to the plaintiff’s case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff’s position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others.” (*Beyda, supra*, 65 Cal.App.4th at p. 520.)
- “To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires ‘an even higher showing’ than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must ‘establish that the sexually harassing conduct permeated [her] direct work

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environment.’ [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, ‘those incidents cannot affect . . . her perception of the hostility of the work environment.’ ” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- “[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep’t. of Health Servs.*, *supra*, 31 Cal.4th at p. 1041, original italics.)
- “The applicable language of the FEHA does not suggest that an employer’s liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee ‘other than an agent,’ ‘not acting as the employer’s agent,’ or ‘not acting within the scope of an agency for the employer.’ By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment ‘by an employee other than an agent *or supervisor*’ (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer’s agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Servs.*, *supra*, 31 Cal.4th at p. 1041, original italics.)
- “[I]n order for the employer to avoid strict liability for the supervisor’s actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor’s actions regardless of whether the supervisor was acting as the employer’s agent.” (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)
- “In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action.” (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)
- “If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no ‘unlawful employment practice’ that the FEHA governs.” (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

CACI No. 2521B

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521C. Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[Name of plaintiff] claims that *[he/she]* was subjected to harassment based on widespread sexual favoritism at *[name of defendant]* and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. “Sexual favoritism” means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences.

To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* was *[an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with]* *[name of defendant]*;
2. That there was sexual favoritism in the work environment;
3. That the sexual favoritism was widespread;
4. That the sexual favoritism was severe or pervasive;
5. That a reasonable *[describe member of protected group, e.g., woman]* in *[name of plaintiff]*’s circumstances would have considered the conduct to be hostile, intimidating, offensive, oppressive, or abusive because of the widespread sexual favoritism;
6. That *[name of plaintiff]* considered the conduct to be hostile, intimidating, offensive, oppressive, or abusive because of the widespread sexual favoritism;
7. *[Select applicable basis of defendant’s liability:]*
[That a supervisor *[engaged in the conduct/created the widespread sexual favoritism]*];
[or]
[That *[name of defendant]* *[or [his/her/its] supervisors or agents]* knew or should have known of the widespread sexual favoritism and failed to take immediate and appropriate corrective action;]
8. That *[name of plaintiff]* was harmed; and
9. That the conduct was a substantial factor in causing *[name of*

plaintiff's harm.

Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018, July 2019

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522C, *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*. For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

In element 7, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of “supervisor,” see CACI No. 2525, *Harassment—“Supervisor” Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522C, *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government

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Code section 12940(j)(1).

- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.” (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- “[S]exual favoritism by a manager may be actionable when it leads employees to believe that ‘they [can] obtain favorable treatment from [the manager] if they became romantically involved with him’, the affair is conducted in a manner ‘so indiscreet as to create a hostile work environment,’ or the manager has engaged in ‘other pervasive conduct . . . which created a hostile work environment.’ ” (*Miller; supra*, 36 Cal.4th at p. 465, internal citations omitted.)
- “[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state.” (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

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- “The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim’s supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment ‘by an employee other than an agent or supervisor’, by implication the FEHA makes the employer strictly liable for harassment by a supervisor.” (*State Dept. of Health Servs.*, *supra*, 31 Cal.4th at pp. 1040–1041, original italics.)
- “The applicable language of the FEHA does not suggest that an employer’s liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee ‘other than an agent,’ ‘not acting as the employer’s agent,’ or ‘not acting within the scope of an agency for the employer.’ By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment ‘by an employee other than an agent *or supervisor*’ (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer’s agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Servs.*, *supra*, 31 Cal.4th at p. 1041, original italics.)
- “[I]n order for the employer to avoid strict liability for the supervisor’s actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor’s actions regardless of whether the supervisor was acting as the employer’s agent.” (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)
- “In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action.” (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)
- “If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no ‘unlawful employment practice’ that the FEHA governs.” (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

CACI No. 2521C

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2522A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[Name of plaintiff] claims that [name of defendant] subjected [him/her] to harassment based on [describe protected status, e.g., race, gender, or age] at [name of employer] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.

To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [name of employer];**
- 2. That [name of plaintiff] was subjected to harassing conduct because [he/she] was [protected status, e.g., a woman];**
- 3. That the harassing conduct was severe or pervasive;**
- 4. That a reasonable [e.g., woman] in [name of plaintiff]’s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 5. That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 6. That [name of defendant] [participated in/assisted/ [or] encouraged] the harassing conduct;**
- 7. That [name of plaintiff] was harmed; and**
- 8. That the conduct was a substantial factor in causing [name of plaintiff]’s harm.**

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff’s coworker. For an employer defendant, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual*

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Defendant. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If there are both employer and individual supervisor defendants (see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dep’t of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was

based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “Under FEHA, an employee who harasses another employee may be held personally liable.” (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)
- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56–2:56.1 (Thomson Reuters)

2522B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[Name of plaintiff] **claims that coworkers at *[name of employer]* were subjected to harassment based on *[describe protected status, e.g., race, gender, or age]* and that this harassment created a work environment for *[name of plaintiff]* that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, *[name of plaintiff]* must prove all of the following:

- 1. That *[name of plaintiff]* was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] *[name of employer]*;**
- 2. That *[name of plaintiff]*, although not personally subjected to harassing conduct, personally witnessed harassing conduct that took place in *[his/her]* immediate work environment;**
- 3. That the harassing conduct was severe or pervasive;**
- 4. That a reasonable *[describe member of protected group, e.g., woman]* in *[name of plaintiff]*'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 5. That *[name of plaintiff]* considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward *[e.g., women]*;**
- 6. That *[name of defendant]* [participated in/assisted/ [or] encouraged] the harassing conduct;**
- 7. That *[name of plaintiff]* was harmed; and**
- 8. That the conduct was a substantial factor in causing *[name of plaintiff]*'s harm.**

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential*

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Factual Elements—Employer or Entity Defendant. For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” *Explained*, and CACI No. 2524, “*Severe or Pervasive*” *Explained*.

If there are both employer and individual supervisor defendants (see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dep’t of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as

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to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “The plaintiff’s work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman’s perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers.” (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- “Harassment against others in the workplace is only relevant to the plaintiff’s case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff’s position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others.” (*Beyda, supra*, 65 Cal.App.4th at p. 520.)
- “To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires ‘an even higher showing’ than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must ‘establish that the sexually harassing conduct permeated [her] direct work environment.’ [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, ‘those incidents cannot affect . . . her perception of the hostility of the work environment.’ ” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)
- “[W]e conclude a nonharassing supervisor, who fails to take action to prevent

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sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA).” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol, supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

**2522C. Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant
(Gov. Code, §§ 12923, 12940(j))**

[Name of plaintiff] claims that *[he/she]* was subjected to harassment based on widespread sexual favoritism at *[name of employer]* and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. “Sexual favoritism” means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences.

To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* was **[an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with]** *[name of employer]*;
2. That there was sexual favoritism in the work environment;
3. That the sexual favoritism was widespread;
4. That the sexual favoritism was severe or pervasive;
5. That a reasonable *[describe member of protected group, e.g., woman]* in *[name of plaintiff]*’s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the widespread sexual favoritism;
6. That *[name of plaintiff]* considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the widespread sexual favoritism;
7. That *[name of defendant]* **[participated in/assisted/ [or] encouraged]** the sexual favoritism;
8. That *[name of plaintiff]* was harmed; and
9. That the conduct was a substantial factor in causing *[name of plaintiff]*’s harm.

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018, July 2019

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521C, *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*. For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

If there are both employer and individual supervisor defendants (see CACI No. 2521C, *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

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- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.” (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- “[S]exual favoritism by a manager may be actionable when it leads employees to believe that ‘they [can] obtain favorable treatment from [the manager] if they became romantically involved with him’, the affair is conducted in a manner ‘so indiscreet as to create a hostile work environment,’ or the manager has engaged in ‘other pervasive conduct . . . which created a hostile work environment.’ ” (*Miller, supra*, 36 Cal.4th at p. 465, internal citations omitted.)
- “[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state.” (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- “[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA).” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)
- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol, supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

4 Witkin, *Summary of California Law* (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., *California Practice Guide: Employment Litigation*, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 *Wrongful Employment Termination Practice* (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, *Sexual and Other Harassment*, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2524. “Severe or Pervasive” Explained

“Severe or pervasive” means conduct that alters the conditions of employment and creates a work environment that is hostile, intimidating, offensive, oppressive, or abusive.

In determining whether the conduct was severe or pervasive, you should consider all the circumstances, including any or all of the following:

- (a) The nature of the conduct;**
- (b) How often, and over what period of time, the conduct occurred;**
- (c) The circumstances under which the conduct occurred;**
- (d) Whether the conduct was physically threatening or humiliating.**

[Name of plaintiff] does not have to prove that [his/her] productivity has declined. It is sufficient to prove that a reasonable person who was subjected to the harassing conduct would find that the conduct so altered working conditions as to make it more difficult to do the job.

[A single incident can be sufficiently severe or pervasive to constitute harassment.]

New September 2003; Revised December 2007, July 2019

Directions for Use

Read this instruction with any of the Work Environment Harassment instructions (CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, and 2522C). Read also CACI No. 2523, “*Harassing Conduct*” Explained. Give the last optional sentence if a single incident forms the basis of the claim. (See Gov. Code, § 12923(b) [single incident of harassing conduct can be sufficient to create a triable issue regarding the existence of a hostile work environment].)

In determining what constitutes “sufficiently pervasive” harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial. (See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610 [262 Cal.Rptr. 842].) Whether this limitation remains in light of Government Code section 12923 is not clear.

Sources and Authority

- “We have agreed with the United States Supreme Court that, to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. The working environment must be evaluated in light of the totality of the

circumstances: ‘[W]hether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.’ ” (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], Ginsburg, J., concurring; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “For sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’ . . . [¶] ‘Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.’ . . . California courts have adopted the same standard in evaluating claims under the FEHA.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)
- “Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. The plaintiff must prove that the defendant’s conduct would have interfered with a reasonable employee’s work performance . . . and that she was actually offended The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609–610 [262 Cal.Rptr. 842], internal citation omitted.)
- “The United States Supreme Court . . . has clarified that conduct need not seriously affect an employee’s psychological well-being to be actionable as abusive work environment harassment. So long as the environment reasonably would be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.” (*Kelly-Zurian v. Wohl Shoe Co., Inc.*

CACI No. 2524

(1994) 22 Cal.App.4th 397, 412 [27 Cal.Rptr.2d 457], internal citations omitted.)

- “As the Supreme Court recently reiterated, in order to be actionable, ‘. . . a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.’ The work environment must be viewed from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’ This determination requires judges and juries to exercise ‘[c]ommon sense, and an appropriate sensitivity to social context’ in order to evaluate whether a reasonable person in the plaintiff’s position would find the conduct severely hostile or abusive.” (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518–519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- “The requirement that the conduct be sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive is a crucial limitation that prevents sexual harassment law from being expanded into a ‘general civility code.’ ” (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal. App. 4th 1367, 1377 [62 Cal.Rptr. 3d 200], internal citations omitted.)
- “[T]he jury only needed to find the harassing conduct to be either severe or pervasive” (*Caldera v. Department of Corrections & Rehabilitation* (2018) 25 Cal.App.5th 31, 40 [235 Cal.Rptr.3d 262].)

Secondary Sources

3 Witkin, *Summary of California Law* (11th. 2017) Agency and Employment, §§ 363, 370

Chin, et al., *California Practice Guide: Employment Litigation* (The Rutter Group) ¶¶ 10:160–10:249

1 *Wrongful Employment Termination Practice* (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.17, 3.36–3.41

2 Wilcox, *California Employment Law*, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, *California Employment Law*, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 *California Forms of Pleading and Practice*, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation, § 2:56 (Thomson Reuters)

2703. Nonpayment of Overtime Compensation—Proof of Overtime Hours Worked

State law requires California employers to keep payroll records showing the hours worked by and wages paid to employees.

If [name of defendant] did not keep accurate records of the hours worked by [name of plaintiff], then [name of plaintiff] may prove the number of overtime hours worked by making a reasonable estimate of those hours.

In determining the amount of overtime hours worked, you may consider [name of plaintiff]’s estimate of the number of overtime hours worked and any evidence presented by [name of defendant] that [name of plaintiff]’s estimate is unreasonable.

New September 2003; Revised June 2005, December 2005

Directions for Use

This instruction is intended for use when the plaintiff is unable to provide evidence of the precise number of hours worked because of the employer’s failure to keep accurate payroll records. (See *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727–728 [245 Cal.Rptr. 36].)

Sources and Authority

- Right of Action for Unpaid Overtime. Labor Code section 1194(a).
- Employer Duty to Keep Payroll Records. Labor Code section 1174(d).
- “[W]here the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages.” (*Furry v. East Bay Publishing, LLC* (2018) 30 Cal.App.5th 1072, 1079 [242 Cal.Rptr.3d 144].)
- “Although the employee has the burden of proving that he performed work for which he was not compensated, public policy prohibits making that burden an impossible hurdle for the employee. . . . ‘In such situation . . . an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.’ ”

CACI No. 2703

(*Hernandez, supra*, 199 Cal.App.3d at p. 727, internal citation omitted.)

- “Once an employee shows that he performed work for which he was not paid, the fact of damage is certain; the only uncertainty is the amount of damage. [Citation.] In such a case, it would be a perversion of justice to deny all relief to the injured person, thereby relieving the wrongdoer from making any restitution for his wrongful act.” (*Furry, supra*, 30 Cal.App.5th at p. 1080.)
- “That [plaintiff] had to draw his time estimates from memory was no basis to completely deny him relief.” (*Furry, supra*, 30 Cal.App.5th at p. 1081.)
- “It is the trier of fact’s duty to draw whatever reasonable inferences it can from the employee’s evidence where the employer cannot provide accurate information.” (*Hernandez, supra*, 199 Cal.App.3d at p. 728, internal citation omitted.)
- “Absent an explicit, mutual wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements. . . . [¶] Since there was no evidence of a wage agreement between the parties that appellant’s . . . per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, . . . appellant incurred damages of uncompensated overtime.” (*Hernandez, supra*, 199 Cal.App.3d at pp. 725–726, internal citations omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment of Wages*, ¶ 11:456 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment of Overtime Compensation*, ¶ 11:955.2 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶ 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72[1] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.40 (Matthew Bender)

3000. Violation of Federal Civil Rights—In General—Essential Factual Elements (42 U.S.C. § 1983)

[Name of plaintiff] **claims that** *[name of defendant]* **violated** *[his/her]* **civil rights. To establish this claim, *[name of plaintiff]* must prove all of the following:**

1. **That** *[name of defendant]* **[intentionally/[other applicable state of mind]]** *[insert wrongful act]*;
 2. **That** *[name of defendant]* **was acting or purporting to act in the performance of** *[his/her]* **official duties;**
 3. **That** *[name of defendant]*'s **conduct violated** *[name of plaintiff]*'s **right** *[insert right, e.g., “of privacy”]*;
 4. **That** *[name of plaintiff]* **was harmed; and**
 5. **That** *[name of defendant]*'s *[insert wrongful act]* **was a substantial factor in causing** *[name of plaintiff]*'s **harm.**
-

New September 2003

Directions for Use

In element 1, the standard is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involve conduct carried out with “deliberate indifference,” and Fourth Amendment claims do not necessarily involve intentional conduct. The “official duties” referred to in element 2 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be a jury issue, so it has been omitted to shorten the wording of element 2. This instruction is intended for claims not covered by any of the following more specific instructions regarding the elements that the plaintiff must prove.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.
- “42 United States Code section 1983 . . . was enacted ‘to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.’ ” (*Modacure v. B&B Vehicle Processing, Inc.* (2018) 30 Cal.App.5th 690, 693 [241 Cal.Rptr.3d 761].)
- “A § 1983 claim creates a species of tort liability, with damages determined ‘according to principles derived from the common law of torts.’ ” (*Mendez v. Cty. of L.A.* (9th Cir. 2018) 897 F.3d 1067, 1074.)
- “A claim under 42 United States Code section 1983 may be based on a showing

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that the defendant, acting under color of state law, deprived the plaintiff of a federally protected right.” (*Modacure, supra*, 30 Cal.App.5th at p. 694.)

- “As we have said many times, § 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred.’ ” (*Graham v. Connor* (1989) 490 U.S. 386, 393–394 [109 S.Ct. 1865, 104 L.Ed.2d 443], internal citation omitted.)
- “Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials.” (*Jones v. Williams* (9th Cir. 2002) 297 F.3d 930, 934.)
- “By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.” (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 890 [104 Cal.Rptr.3d 352].)
- “Section 1983 can also be used to enforce federal statutes. For a statutory provision to be privately enforceable, however, it must create an individual right.” (*Henry A. v. Willden* (9th Cir. 2012) 678 F.3d 991, 1005, internal citation omitted.)
- “Section 1983 claims may be brought in either state or federal court.” (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)
- “[S]tates are not ‘persons’ subject to suit under section 1983.” (*Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 654 [242 Cal.Rptr.3d 757].)
- “The jury was properly instructed on [plaintiff]’s burden of proof and the particular elements of the section 1983 claim. (CACI No. 3000.)” (*King v. State of California* (2015) 242 Cal.App.4th 265, 280 [195 Cal.Rptr.3d 286].)
- “ ‘State courts look to federal law to determine what conduct will support an action under section 1983. The first inquiry in any section 1983 suit is to identify the precise constitutional violation with which the defendant is charged.’ ” (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 203 [73 Cal.Rptr.2d 571], internal citations omitted.)
- “ ‘Qualified immunity is an affirmative defense against section 1983 claims. Its purpose is to shield public officials “from undue interference with their duties and from potentially disabling threats of liability.” The defense provides immunity from suit, not merely from liability. Its purpose is to spare defendants the burden of going forward with trial.’ Because it is an immunity from suit, not just a mere defense to liability, it is important to resolve immunity questions at the earliest possible stage in litigation. Immunity should ordinarily be resolved by the court, not a jury.” (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 342 [54 Cal.Rptr.2d 772], internal citations omitted.)

- “[D]efendants cannot be held liable for a constitutional violation under 42 U.S.C. § 1983 unless they were integral participants in the unlawful conduct. We have held that defendants can be liable for ‘integral participation’ even if the actions of each defendant do not ‘rise to the level of a constitutional violation.’ ” (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1241, internal citation omitted.)
- “Constitutional torts employ the same measure of damages as common law torts and are not augmented ‘based on the abstract “value” or “importance” of constitutional rights’ Plaintiffs have the burden of proving compensatory damages in section 1983 cases, and the amount of damages depends ‘largely upon the credibility of the plaintiffs’ testimony concerning their injuries.’ ” (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 321 [103 Cal.Rptr.2d 339], internal citations omitted.)
- “[E]ntitlement to compensatory damages in a civil rights action is not a matter of discretion: ‘Compensatory damages . . . are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.’ ” (*Hazle v. Crofoot* (9th Cir. 2013) 727 F.3d 983, 992.)
- “[T]he state defendants’ explanation of the jury’s zero-damages award as allocating all of [plaintiff]’s injury to absent persons reflects the erroneous view that not only could zero damages be awarded to [plaintiff], but that [plaintiff]’s damages were capable of apportionment. [Plaintiff] independently challenges the jury instruction and verdict form that allowed the jury to decide this question, contending that the district judge should have concluded, as a matter of law, that [plaintiff] was entitled to compensatory damages and that defendants were jointly and severally liable for his injuries. He is correct. The district judge erred in putting the question of apportionment to the jury in the first place, because the question of whether an injury is capable of apportionment is a legal one to be decided by the judge, not the jury.” (*Hazle, supra*, 727 F.3d at pp. 994–995.)
- “An individual acts under color of state law when he or she exercises power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’ ” (*Naffe v. Frey* (9th Cir. 2015) 789 F.3d 1030, 1036.)
- “The Supreme Court has interpreted the phrase ‘under “color” of law’ to mean ‘under “pretense” of law.’ A police officer’s actions are under pretense of law only if they are ‘in some way “related to the performance of his official duties.” ’ By contrast, an officer who is ‘pursuing his own goals and is not in any way subject to control by [his public employer],’ does not act under color of law, unless he ‘purports or pretends’ to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not ‘purport[] or pretend[]’ to be officers, do not act under color of law.” (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

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- “A state employee who is off duty nevertheless acts under color of state law when (1) the employee ‘purport[s] to or pretend[s] to act under color of law,’ (2) his ‘pretense of acting in the performance of his duties . . . had the purpose and effect of influencing the behavior of others,’ and (3) the harm inflicted on plaintiff ‘related in some meaningful way either to the officer’s governmental status or to the performance of his duties,’ ” (*Naffe, supra*, 789 F.3d at p. 1037, internal citations omitted.)
- “[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action.” (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)
- “ ‘While generally not applicable to private parties, a § 1983 action can lie against a private party when “he is a willful participant in joint action with the State or its agents.” ’ ” (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 396 [218 Cal.Rptr.3d 38].)
- “The Ninth Circuit has articulated four tests for determining whether a private person acted under color of law: (1) the public function test, (2) the joint action test, (3) the government nexus test, and (4) the government coercion or compulsion test. ‘Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists.’ ‘ “[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.” ’ ” (*Julian, supra*, 11 Cal.App.5th at p. 396.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892 et seq.

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law—General Principles* (Civil Rights Act of 1871, 42 U.S.C. § 1983), ¶¶ 7.05–7.07, Ch. 17, *Deprivation of Rights Under Color of State Law—General Principles* (Civil Rights Act of 1871, 42 U.S.C. § 1983), ¶ 17.02 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12*, 8.40

**3001. Local Government Liability—Policy or Custom—Essential
Factual Elements (42 U.S.C. § 1983)**

[Name of plaintiff] claims that *[he/she]* was deprived of *[his/her]* civil rights as a result of an official *[policy/custom]* of the *[name of local governmental entity]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That the *[name of local governmental entity]* had an official *[policy/custom]* *[specify policy or custom]*;
2. That *[name of officer or employee]* was an *[officer/employee/other]* of *[name of local governmental entity]*;
3. That *[name of officer or employee]* *[intentionally/[insert other applicable state of mind]]* *[insert conduct allegedly violating plaintiff's civil rights]*;
4. That *[name of officer or employee]*'s conduct violated *[name of plaintiff]*'s right *[specify right]*;
5. That *[name of officer or employee]* acted because of this official *[policy/custom]*.

New September 2003; Revised December 2010; Renumbered from CACI No. 3007 and Revised December 2012

Directions for Use

Give this instruction and CACI No. 3002, “*Official Policy or Custom*” Explained, if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the entity’s official policy or custom. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*, and the instructions on the particular constitutional violation alleged.

In element 3, a constitutional violation is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involving failure to provide a prisoner with proper medical care require “deliberate indifference.” (See *Hudson v. McMillian* (1992) 503 U.S. 1, 5 [112 S.Ct. 995, 117 L.Ed.2d 156].) And Fourth Amendment claims require an “unreasonable” search or seizure. (See *Sacramento County Deputy Sheriffs’ Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834].)

For other theories of liability against a local governmental entity, see CACI No. 3003, *Local Government Liability—Failure to Train—Essential Factual Elements*, and CACI No. 3004, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- “[I]t is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” (*Monell v. Dept. of Social Services of New York* (1978) 436 U.S. 658, 694 [98 S.Ct. 2018, 56 L.Ed.2d 611].)
- Local governmental entities “ ‘can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted. . . .’ ” Local governmental entities also can be sued “ ‘for constitutional deprivations visited pursuant to governmental “custom.” ’ ” In addition, “ ‘[t]he plaintiff must . . . demonstrate that, through its *deliberate* conduct, the municipality was the “moving force” behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.’ ” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1147 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)
- “Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy. This was the situation in *Monell*, where there was an explicit policy requiring pregnant government employees to take unpaid leaves of absence before such leaves were medically required. . . . Alternatively, the municipality may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy.” (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)
- “ ‘[I]n order to successfully maintain an action under 42 United States Code section 1983 against governmental defendants for the tortious conduct of employees under federal law, it is necessary to establish that the conduct occurred in execution of a government’s policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.’ ” (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1564 [266 Cal.Rptr. 682], internal citations omitted.)
- “*Monell* provides that a governmental entity may only be held liable where the entity causes a constitutional violation. To establish *Monell* liability, ‘ ‘a plaintiff must ‘identify the challenged policy, [practice, or custom,] attribute it to the [county] itself, and show a causal link between the execution of the policy, [practice, or custom,] and the injury suffered.’ ” [Citation.] In addition, plaintiffs must “present scienter-like evidence of indifference on the part of a particular policymaker or policymakers.” [Citation.] The requirement of producing scienter-like evidence on the part of an official with policymaking authority is consistent with the conclusion that “absent the conscious decision or deliberate indifference of some natural person, a [governmental entity], as an abstract entity, cannot be deemed to have engaged in a constitutional violation

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by virtue of a policy, a custom or failure to train.” [Citation.] “[I]n the absence of any unconstitutional statute or rule, it is plaintiffs’ burden to articulate a factual basis that demonstrates considerably more proof than a single incident.” ’ ’ (*Arista v. County of Riverside* (2018) 29 Cal.App.5th 1051, 1064 [241 Cal.Rptr.3d 437].)

- “Under *Monell*, a local government body can be held liable under § 1983 for policies of inaction as well as policies of action. A policy of action is one in which the government body itself violates someone’s constitutional rights, or instructs its employees to do so; a policy of inaction is based on a government body’s ‘failure to implement procedural safeguards to prevent constitutional violations.’ ” (*Jackson v. Barnes* (9th Cir. 2014) 749 F.3d 755, 763], internal citations omitted.)
- “Normally, the question of whether a policy or custom exists would be a jury question. However, when there are no genuine issues of material fact and the plaintiff has failed to establish a prima facie case, disposition by summary judgment is appropriate.” (*Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911, 920.)
- “A triable issue exists as to whether the root of the unconstitutional behavior exhibited in [plaintiff]’s case lies in the unofficial operating procedure of [defendant] County or in the errant acts of individual social workers, and this question should go to a jury.” (*Kirkpatrick v. County of Washoe* (9th Cir. 2015) 792 F.3d 1184, 1201.)
- “At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award.” (*Choate, supra*, 86 Cal.App.4th at p. 328.)
- “To meet this [*Monell*] requirement, the plaintiff must show both causation-in-fact and proximate causation.” (*Gravelet-Blondin v. Shelton* (9th Cir. 2013) 728 F.3d 1086, 1096.)
- “Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]’s injuries. [Plaintiff]’s recovery, if any, based upon a *Monell* claim would be limited to nominal damages.” (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)
- “Local governmental bodies such as cities and counties are considered ‘persons’ subject to suit under section 1983. States and their instrumentalities, on the other hand, are not.” (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1101 [100 Cal.Rptr.2d 289], internal citations omitted.)
- “A municipality can be sued under section 1983 for ‘constitutional deprivations visited pursuant to governmental “custom.” ’ However, ‘Congress did not intend municipalities to be held liable unless action pursuant to official municipal

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policy of some nature caused a constitutional tort. In particular, . . . a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.’ ” (*Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1118 [190 Cal.Rptr.3d 97], original italics, internal citation omitted.)

- “A local governmental unit is liable only if the alleged deprivation of rights ‘implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers,’ or when the injury is in ‘execution of a [local] government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.’ ” (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1171 [80 Cal.Rptr.2d 860], internal citations omitted.)
- “A municipality’s policy or custom resulting in constitutional injury may be actionable even though the individual public servants are shielded by good faith immunity.” (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 568 [195 Cal.Rptr. 268], internal citations omitted.)
- “No punitive damages can be awarded against a public entity.” (*Choate, supra*, 86 Cal.App.4th at p. 328, internal citation omitted.)
- “[T]he requirements of *Monell* do apply to suits against private entities under § 1983. . . . [W]e see no basis in the reasoning underlying *Monell* to distinguish between municipalities and private entities acting under color of state law.” (*Tsao v. Desert Palace, Inc.* (9th Cir. 2012) 698 F.3d 1128, 1139, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892 et seq.

17A Moore’s Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[2][a] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

[Name of plaintiff] claims that *[name of defendant]* denied *[him/her]* full and equal *[accommodations/advantages/facilities/privileges/services]* because of *[his/her]* *[sex/race/color/religion/ancestry/ national origin/ disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[insert other actionable characteristic]]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* *[denied/aided or incited a denial of/discriminated or made a distinction that denied]* full and equal *[accommodations/advantages/facilities/privileges/services]* to *[name of plaintiff]*;
2. *[That a substantial motivating reason for [name of defendant]’s conduct was [its perception of] [name of plaintiff]’s [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[insert other actionable characteristic]]];*
[That the [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/ citizenship/primary language/immigration status/[insert other actionable characteristic]] of a person whom [name of plaintiff] was associated with was a substantial motivating reason for [name of defendant]’s conduct;]
3. That *[name of plaintiff]* was harmed; and
4. That *[name of defendant]’s* conduct was a substantial factor in causing *[name of plaintiff]’s* harm.

New September 2003; Revised December 2011, June 2012; Renumbered from CACI No. 3020 December 2012; Revised June 2013, June 2016

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Note that element 2 uses the term “substantial motivating reason” to express both intent and causation between the protected classification and the defendant’s conduct. “Substantial motivating reason” has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of

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both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, “*Substantial Motivating Reason*” Explained.) Whether the FEHA standard applies under the Unruh Act has not been addressed by the courts.

With the exception of claims that are also violations of the Americans With Disabilities Act (ADA) (see *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623]), intentional discrimination is required for violations of the Unruh Act. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149 [278 Cal.Rptr. 614, 805 P.2d 873].) The intent requirement is encompassed within the motivating-reason element. For claims that are also violations of the ADA, do not give element 2.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

For an instruction on damages under the Unruh Act, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than \$4,000 regardless of any actual damages. (Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Unruh Act violations are per se injurious]; Civ. Code, § 52(a) [provides for minimum statutory damages for every violation regardless of the plaintiff’s actual damages]; see also Civ. Code, § 52(h) [“actual damages” means special and general damages].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

The Act is not limited to the categories expressly mentioned in the statute. Other forms of arbitrary discrimination by business establishments are prohibited. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 736 [180 Cal.Rptr. 496, 640 P.2d 115].) Therefore, this instruction allows the user to “insert other actionable characteristic” throughout. Nevertheless, there are limitations on expansion beyond the statutory classifications. First, the claim must be based on a personal characteristic similar to those listed in the statute. Second, the court must consider whether the alleged discrimination was justified by a legitimate business reason. Third, the consequences of allowing the claim to proceed must be taken into account. (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1392–1393 [127 Cal.Rptr.3d 794]; see *Harris, supra*, 52 Cal.3d at pp. 1159–1162.) However, these issues are most likely to be resolved by the court rather than the jury. (See *Harris, supra*, 52 Cal.3d at p. 1165.) Therefore, no elements are included to address what may be an “other actionable characteristic.” If there are contested

factual issues, additional instructions or special interrogatories may be necessary.

Sources and Authority

- Unruh Civil Rights Act. Civil Code section 51.
- Remedies Under Unruh Act. Civil Code section 52.
- “The Unruh Act was enacted to ‘create and preserve a nondiscriminatory environment in California business establishments by “banishing” or “eradicating” arbitrary, invidious discrimination by such establishments.’ ” (*Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 937 [190 Cal.Rptr.3d 33].)
- “Invidious discrimination is the treatment of individuals in a manner that is malicious, hostile, or damaging.” (*Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1404 [195 Cal.Rptr.3d 706].)
- “ ‘The Legislature used the words “all” and “of every kind whatsoever” in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term “business establishments” was used in the broadest sense reasonably possible. The word “business” embraces everything about which one can be employed, and it is often synonymous with “calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain.” The word “establishment,” as broadly defined, includes not only a fixed location, such as the “place where one is permanently fixed for residence or business,” but also a permanent “commercial force or organization” or “a permanent settled position, (as in life or business).” ’ ” (*O’Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795 [191 Cal.Rptr. 320, 662 P.2d 427], internal citations omitted.)
- Whether a defendant is a “business establishment” is decided as an issue of law. (*Rotary Club of Duarte, supra*, 178 Cal.App.3d at p. 1050.)
- “Here, the City was not acting as a business establishment. It was amending an already existing municipal code section to increase the minimum age of a responsible person from the age of 21 years to 30. The City was not directly discriminating against anyone and nothing in the plain language of the Unruh Civil Rights Act makes its provisions applicable to the actions taken by the City.” (*Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 175 [196 Cal.Rptr.3d 267].)
- “[T]he protection against discrimination afforded by the Unruh Act applies to ‘all persons,’ and is not reserved for restricted categories of prohibited discrimination.” (*Marina Point, Ltd., supra*, 30 Cal.3d at p. 736.)
- “Nevertheless, the enumerated categories, bearing the ‘common element’ of being ‘personal’ characteristics of an individual, necessarily confine the Act’s reach to forms of discrimination based on characteristics similar to the statutory classifications—such as ‘a person’s geographical origin, physical attributes, and personal beliefs.’ The ‘personal characteristics’ protected by the Act are not defined by ‘immutability, since some are, while others are not [immutable], but

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that they represent traits, conditions, decisions, or choices fundamental to a person's identity, beliefs and self-definition.' ” (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1145 [228 Cal.Rptr.3d 336].)

- “In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act ‘prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.’ These judicially recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18.” (*Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552], internal citations omitted.)
- “The Act applies not merely in situations where businesses exclude individuals altogether, but also ‘where unequal treatment is the result of a business practice.’ ‘Unequal treatment includes offering price discounts on an arbitrary basis to certain classes of individuals.’ ” (*Candelore, supra*, 19 Cal.App.5th at pp. 1145–1146, internal citations omitted.)
- “Race discrimination claims under . . . the Unruh Civil Rights Act follow the analytical framework established under federal employment law. Although coaches are different from ‘ordinary employers,’ the *McDonnell Douglas* framework strikes the appropriate balance in evaluating race discrimination claims brought by college athletes: . . .” (*Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 661 [242 Cal.Rptr.3d 757], internal citations omitted.)
- “[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test, which has been developed and applied by the federal courts primarily in employment discrimination cases, to a general discrimination-in-public-accommodations statute like the Unruh Act. Although evidence of adverse impact on a particular group of persons may have probative value in public accommodations cases and should therefore be admitted in appropriate cases subject to the general rules of evidence, a plaintiff must nonetheless plead and prove a case of intentional discrimination to recover under the Act.” (*Harris, supra*, 52 Cal.3d at p. 1149.)
- “On examining the language, statutory context, and history of section 51, subdivision (f), we conclude . . . [t]he Legislature’s intent in adding subdivision (f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52.” (*Munson, supra*, 46 Cal.4th at p. 665.)
- “Civil Code section 51, subdivision (f) states: ‘A violation of the right of any individual under the federal [ADA] shall also constitute a violation of this

section.’ The ADA provides in pertinent part: ‘No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation.’ The ADA defines discrimination as ‘a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.’ ” (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825], internal citations omitted.)

- “ ‘Although the Unruh Act proscribes “any form of arbitrary discrimination,” certain types of discrimination have been denominated “reasonable” and, therefore, not arbitrary.’ Thus, for example, ‘legitimate business interests may justify limitations on consumer access to public accommodations.’ ” (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684], internal citations omitted.)
- “Discrimination may be reasonable, and not arbitrary, in light of the nature of the enterprise or its facilities, legitimate business interests (maintaining order, complying with legal requirements, and protecting business reputation or investment), and public policy supporting the disparate treatment.” (*Javorsky, supra*, 242 Cal.App.4th at p. 1395.)
- “[T]he Act’s objective of prohibiting ‘unreasonable, arbitrary or invidious discrimination’ is fulfilled by examining whether a price differential reflects an ‘arbitrary, class-based generalization.’ . . . [A] policy treating age groups differently in this respect may be upheld, at least if the pricing policy (1) ostensibly provides a social benefit to the recipient group; (2) the recipient group is disadvantaged economically when compared to other groups paying full price; and (3) there is no invidious discrimination.” (*Javorsky, supra*, 242 Cal.App.4th at p. 1399.)
- “Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public.” (*Harris, supra*, 52 Cal.3d at p. 1165, internal citations omitted.)
- “It is thus manifested by section 51 that all persons are entitled to the full and equal privilege of associating with others in any business establishment. And section 52, liberally interpreted, makes clear that discrimination by such a business establishment against one’s right of association on account of the associates’ color, is violative of the Act. It follows . . . that discrimination by a business establishment against persons on account of their association with others of the black race is actionable under the Act.” (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20].)

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- “Appellant is disabled as a matter of law not only because she is HIV positive, but also because it is undisputed that respondent ‘regarded or treated’ her as a person with a disability. The protection of the Unruh Civil Rights Act extends both to people who are currently living with a physical disability that limits a life activity and to those who are regarded by others as living with such a disability. . . . ‘Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute’s plain language leads to the conclusion that the “regarded as” definition casts a broader net and protects *any* individual “regarded” or “treated” by an employer “as having, or having had, any physical condition that makes achievement of a major life activity difficult” or may do so in the future.’ Thus, even an HIV-positive person who is outwardly asymptomatic is protected by the Unruh Civil Rights Act.” (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 529–530 [155 Cal.Rptr.3d 620], original italics, internal citations omitted.)
- “[T]he Unruh Civil Rights Act prohibits arbitrary discrimination in public accommodations with respect to trained service dogs, but not to service-animals-in-training.” (*Miller v. Fortune Commercial Corp.* (2017) 15 Cal.App.5th 214, 224 [223 Cal.Rptr.3d 133].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 994–1015

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10–116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 et seq. (Matthew Bender)

3513. Goodwill

In this case, [name of business owner] is entitled to compensation for any loss of goodwill as a part of just compensation. “Goodwill” is the benefit that a business gains as a result of its location, reputation for dependability, skill, or quality, and any other circumstances that cause a business to keep old customers or gain new customers. You must include the amount of any loss of goodwill as an item in your award for just compensation.

New September 2003; Revised February 2007

Sources and Authority

- Compensation for Loss of Goodwill. Code of Civil Procedure section 1263.510.
- “Goodwill is the amount by which a business’s overall value exceeds the value of its constituent assets, often due to a recognizable brand name, a sterling reputation, or an ideal location. Regardless of the cause, however, goodwill almost always translates into a business’s profitability.” (*People ex rel. Dept. of Transportation v. Dry Canyon Enterprises, LLC* (2012) 211 Cal.App.4th 486, 493–494 [149 Cal.Rptr.3d 601], internal citation omitted.)
- “Historically, lost business goodwill was not recoverable under eminent domain law. However, in 1975 the Legislature enacted section 1263.510 ‘in response to widespread criticism of the injustice wrought by the Legislature’s historic refusal to compensate condemnees whose ongoing businesses were diminished in value by a forced relocation. [Citations.] The purpose of the statute was unquestionably to provide monetary compensation for the kind of losses which typically occur when an ongoing small business is forced to move and give up the benefits of its former location.’ Thus, a business owner’s right to compensation for loss of goodwill is a statutory right, not a constitutional right.” (*City and County of San Francisco v. Coyne* (2008) 168 Cal.App.4th 1515, 1522 [86 Cal.Rptr.3d 255], internal citations omitted.)
- “Determining liability for loss of goodwill under section 1263.510 involves a two-step process. ‘First, the court determines *entitlement*: that is, whether the party seeking compensation has presented sufficient evidence of the conditions for compensation set forth in subdivision (a)—causation, unavailability, and no double recovery—such that the party is entitled to *some* compensation. If the party meets this burden, the matter proceeds to a second step, in which a jury (unless waived) determines the *amount* of the loss.’ Thus, if that party meets certain ‘“qualifying conditions for such compensation,” ’ it has a right to a jury trial on the amount of compensation due.” (*Los Angeles County Metropolitan Transportation Authority v. Yum Yum Donut Shops, Inc.* (2019) 32 Cal.App.5th 662, 669 [244 Cal.Rptr.3d 201], original italics, internal citation omitted.)

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- “ ‘Under section 1263.510, subdivision (a), the business owner has the initial burden of showing entitlement to compensation for lost goodwill.’ ” (*City and County of San Francisco, supra*, 168 Cal.App.4th at pp. 1522–1523, internal citations omitted.)
- “ ‘Since the conditions set forth in subdivision (a) all pertain to the ‘loss’ of ‘goodwill,’ the initial obligation to establish entitlement to compensation requires a showing, ‘as a threshold matter, that the business had goodwill to lose.’ ” (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation* (2016) 5 Cal.App.5th 190, 201 [209 Cal.Rptr.3d 461].)
- “[I]n the entitlement phase, the party seeking compensation need only show that there was *some* loss of the benefit that the business was enjoying before the taking due to its location, reputation, and the like, without necessarily having to quantify its precise value.” (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra*, 5 Cal.App.5th at p. 204, original italics.)
- “ ‘After entitlement to goodwill is shown (which includes a showing that compensation for the loss will not be duplicated) neither party has the burden of proof with regard to valuation.’ ” (*Redevelopment Agency of the City of Pomona v. Thrifty Oil Co.* (1992) 4 Cal.App.4th 469, 475 [5 Cal.Rptr.2d 687], internal citations omitted.)
- “ ‘Only an owner of a business conducted on the real property taken may claim compensation for loss of goodwill.’ ” (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 537 [86 Cal.Rptr.2d 473], internal citation omitted.)
- “[W]hile there are no explicit statutory requirements regarding an expert’s use of a particular methodology for valuing lost goodwill, the expert’s methodology must provide a fair estimate of *actual value* and cannot be based on hypothetical or speculative uses of a condemned business” (*City and County of San Francisco, supra*, 168 Cal.App.4th at p. 1523, original italics.)
- “ ‘The underlying purpose of this statute is to provide compensation for the kind of losses which typically occur when an ongoing business is forced to move and give up the benefits of its former location. It includes not only compensation for lost patronage itself, but also for expenses reasonably incurred in an effort to prevent a loss of patronage.’ ” (*San Diego Metropolitan Transit Development Bd., supra*, 73 Cal.App.4th at p. 537, internal citations omitted.)
- “ ‘Goodwill must, of course, be measured by a method which excludes the value of tangible assets or the normal return on those assets. However, the courts have wisely maintained that there is no single acceptable method of valuing goodwill. Valuation methods will differ with the nature of the business or practice and with the purpose for which the evaluation is conducted.’ ” (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 271, fn. 7 [203 Cal.Rptr. 772, 681 P.2d 1340], internal citations omitted.)
- “ ‘The value of this goodwill may be determined using a variety of methods: for

example, determining the total value of the business by capitalizing its cash flow, and then subtracting its tangible assets; or determining the amount by which the business's average profits exceed a fair rate of return on the fair market value of its tangible assets, and then capitalizing that amount. But the essential idea is that there is some intangible 'X-factor' that gives the business greater value than it would otherwise have." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra*, 5 Cal.App.5th at p. 201, internal citation omitted.)

- "Certainly a comparison of the pre-taking and post-taking goodwill values would be one way to quantify the amount of goodwill that was lost due to the taking. But it is not evident from the appellate record that the amount of lost goodwill could not be calculated in some other manner." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra*, 5 Cal.App.5th at p. 205.)
- "Section 1263.510 does not dictate that the only way to obtain compensation for the loss of goodwill is to prove pre-taking goodwill value based on a business value in excess of its tangible assets. Nor does the statute define goodwill as the value of a business not attributable to its tangible assets." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra*, 5 Cal.App.5th at p. 211.)
- "[A] 'cost to create' approach is a permissible means by which to value goodwill under [Code of Civil Procedure] section 1263.510 where, as here, a nascent business has not yet experienced excess profits but clearly has goodwill within the meaning of the statute and experiences a total loss of goodwill due to condemnation of the property on which the business is operated." (*Inglewood Redevelopment Agency v. Aklilu* (2007) 153 Cal.App.4th 1095, 1102 [64 Cal.Rptr.3d 519].)
- "As *Aklilu* implicitly recognized, unless there is independent proof that a business possesses goodwill in the first place, the cost-to-create methodology does not reflect the cost of creating any actual goodwill. Instead, it simply adds up costs and calls the total 'goodwill.' The relationship between goodwill and the costs to create breaks down even further when the condemnation takes only a portion of the business's goodwill. In that situation, it becomes necessary to figure out which costs match up with which portions of goodwill that are lost; in most cases, this will devolve into an exercise in futility or fiction." (*Dry Canyon Enterprises, LLC, supra*, 211 Cal.App.4th at p. 494.)
- "Since quantifying the loss of goodwill is a matter concerning the amount of goodwill lost, it is for the jury to decide between the competing views of the experts." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra*, 5 Cal.App.5th at pp. 213–214.)
- "A business which is required to move because of the taking of the property on which it operates has suffered a loss from the taking. This is true whether the tenancy is for a fixed term, or is a periodic tenancy as in this case. The value of

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the lost goodwill is affected by the probable remaining term of the tenancy. Evidence of the remaining length of a lease and the existence of an option to renew a lease are, of course, relevant for determining the amount of compensation, if any, to be paid for loss of goodwill. Similarly, evidence of the pre-condemnation duration of a periodic tenancy and the quality and mutual satisfaction in the landlord and tenant relationship are probative for determination of compensation for loss of goodwill.” (*Los Angeles Unified Sch. Dist. v. Pulgarin* (2009) 175 Cal.App.4th 101, 107 [95 Cal.Rptr.3d 527], internal citation omitted.)

- “The statute’s unambiguous plain language provides that a condemnee must show it cannot prevent a loss of goodwill by relocating or otherwise taking reasonable steps to prevent that loss to be entitled to a jury trial on the amount of that unavoidable loss. A fortiori, if the condemnee would lose goodwill—even if it relocated its business or otherwise reasonably mitigated the loss—the condemnee satisfies its threshold burden.” (*Los Angeles County Metropolitan Transportation Authority, supra*, 32 Cal.App.5th at p. 670.)
- “[I]n some circumstances, there may be a limited right to reimbursement for costs incurred to mitigate loss of goodwill.” (*Los Angeles Unified School Dist. v. Casasola* (2010) 187 Cal.App.4th 189, 208 [114 Cal.Rptr.3d 318].)
- “Although the statutory scheme applies only to eminent domain proceedings, the right to recover lost goodwill has been extended to the indirect condemnee. Thus, ‘goodwill is compensable in an inverse condemnation action to the same extent and with the same limitations on recovery found in . . . section 1263.510.’ ” (*San Diego Metropolitan Transit Development Bd., supra*, 73 Cal.App.4th at p. 537, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1383–1385

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:314–7.316.3 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8C-H, *Foundation*, ¶ 8:748.2 (The Rutter Group)

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.64–4.78

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, § 508.19; Ch. 512, *Compensation*, § 512.13 (Matthew Bender)

4 Nichols on Eminent Domain, Ch. 13, *Loss of Business Goodwill*, § 13.18[5] (Matthew Bender)

6A Nichols on Eminent Domain, Ch. 29, *Loss of Business Goodwill*, §§ 29.01–29.08 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.136 (Matthew Bender)

3704. Existence of “Employee” Status Disputed

[Name of plaintiff] must prove that *[name of agent]* was *[name of defendant]*'s employee.

In deciding whether *[name of agent]* was *[name of defendant]*'s employee, the most important factor is whether *[name of defendant]* had the right to control how *[name of agent]* performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker *[without cause]*. It does not matter whether *[name of defendant]* exercised the right to control.

In deciding whether *[name of defendant]* was *[name of agent]*'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that *[name of defendant]* was the employer of *[name of agent]*. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.

- (a) *[Name of defendant]* supplied the equipment, tools, and place of work;
- (b) *[Name of agent]* was paid by the hour rather than by the job;
- (c) *[Name of defendant]* was in business;
- (d) The work being done by *[name of agent]* was part of the regular business of *[name of defendant]*;
- (e) *[Name of agent]* was not engaged in a distinct occupation or business;
- (f) The kind of work performed by *[name of agent]* is usually done under the direction of a supervisor rather than by a specialist working without supervision;
- (g) The kind of work performed by *[name of agent]* does not require specialized or professional skill;
- (h) The services performed by *[name of agent]* were to be performed over a long period of time; *[and]*
- (i) *[Name of defendant]* and *[name of agent]* believed that they had an employer-employee relationship~~./;~~ *[and]*
- (j) *[Specify other factor]*.

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New September 2003; Revised December 2010, June 2015, December 2015, November 2018

Directions for Use

This instruction is based on *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399] and the Restatement Second of Agency, section 220. It is sometimes referred to as the *Borello* test or the common law test. (See *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 934 [232 Cal.Rptr.3d 1, 416 P.3d 1].) It is intended to address the employer-employee relationship for purposes of assessing vicarious responsibility on the employer for the employee’s acts. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of “Agency” Relationship Disputed*.

Secondary factors (a)–(i) come from the Restatement section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f.) They have been phrased so that a yes answer points toward an employment relationship. Omit any that are not relevant. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc.*, *supra*, 48 Cal.3d at pp. 354–355.) Therefore, an “other” option (j) has been included.

Borello was a workers’ compensation case. In *Dynamex*, *supra*, the court, in holding that *Borello* did not control the specific wage order dispute at issue, noted that “it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue.” (*Dynamex Operations W.*, *supra*, 4 Cal.5th at p. 934.) The court also said that “[t]he *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation.” (*Id.* at p. 935.) With respondeat superior, there is no statutory provision or social welfare legislation to be considered. (Cf. *Garcia v. Border Transportation Group, LLC* (2018) 28 Cal.App.5th 558, 571 [239 Cal.Rptr.3d 360] [no reason to apply *Dynamex* categorically to every working relationship].)

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.
- Rebuttable Presumption that Contractor Is Employee Rather Than Independent Contractor; Proof of Independent Contractor Status. Labor Code section 2750.5.
- “[S]ubject to certain policy considerations, a hirer . . . cannot be held vicariously liable for the negligence of his independent contractors.” (*Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160, 168 [197 Cal.Rptr.3d 753].)
- “Whether a common law employer-employee relationship exists turns foremost

on the degree of a hirer’s right to control how the end result is achieved.”
(*Ayala, supra*, 59 Cal.4th at p. 528.)

- “However, the courts have long recognized that the ‘control’ test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the ‘most important’ or ‘most significant’ consideration, the authorities also endorse several ‘secondary’ indicia of the nature of a service relationship.” (*S. G. Borello & Sons, Inc., supra*, 48 Cal.3d at p. 350, internal citations omitted.)
- “While the extent of the hirer’s right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider ‘(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.’ ” (*Ayala, supra*, 59 Cal.4th at p. 532.)
- “ ‘Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.’ ” (*S. G. Borello & Sons, Inc., supra*, 48 Cal.3d at p. 351, internal citations omitted.)
- “[T]he Restatement guidelines heretofore approved in our state remain a useful reference.” (*S. G. Borello & Sons, Inc., supra*, 48 Cal.3d at p. 354.)
- “We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the ‘right to control the work,’ the factors include (1) the alleged employee’s opportunity for profit or loss depending on his managerial skill; (2) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer’s business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers’ compensation law.” (*S. G. Borello & Sons, Inc., supra*, 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

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- “[A]t common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context—in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker’s actions. In the vicarious liability context, the hirer’s right to supervise and control the details of the worker’s actions was reasonably viewed as crucial, because ‘ “[t]he extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them” ’ For this reason, the question whether the hirer controlled the details of the worker’s activities became the primary common law standard for determining whether a worker was considered to be an employee or an independent contractor.” (*Dynamex Operations W.*, *supra*, 4 Cal.5th at p. 927, internal citations omitted.)
- “[A]lthough we have sometimes characterized *Borello* as embodying the common law test or standard for distinguishing employees and independent contractors, it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue. In other words, *Borello* calls for application of a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at issue.” (*Dynamex Operations W.*, *supra*, 4 Cal.5th at p. 934, original italics, internal citation omitted.)
- “ ‘*Dynamex* did not purport to replace the *Borello* standard in every instance where a worker must be classified as either an independent contractor or an employee for purposes of enforcing California’s labor protections.’ To the contrary, the Supreme Court recognized that different standards could apply to different statutory claims:” (*Garcia*, *supra*, 28 Cal.App.5th at p. 570, internal citation omitted.)
- “In the absence of an argument that the statutory purposes underlying those claims compel application of a different standard, we conclude *Borello* furnishes the proper standard as to non-wage-order claims.” (*Garcia*, *supra*, 28 Cal.App.5th at p. 571.)
- “The trial court’s determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences. ‘ “Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact” ’ The question is one of law only if the evidence is undisputed.” (*Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1225 [223 Cal.Rptr.3d 761].)
- The burden of proving the existence of an agency rests on the one affirming its

existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- “The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.” (*S. G. Borello & Sons, Inc., supra*, 48 Cal.3d at p. 342.)
- “[A]lthough the Caregiver Contract signed by Plaintiff stated she was an independent contractor, not an employee, there is evidence of other indicia of employment and Plaintiff averred in her declaration that the Caregiver Contract was presented to her ‘on a take it or leave it basis.’ ‘A party’s use of a label to describe a relationship with a worker . . . will be ignored where the evidence of the parties’ actual conduct establishes that a different relationship exists.’ ” (*Duffey v. Tender Heart Home Care Agency, LLC* (2019) 31 Cal.App.5th 232, 257–258 [242 Cal.Rptr.3d 460].)
- “It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship.” (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)
- “[W]hat matters is whether a hirer has the “legal right to control the activities of the alleged agent” That a hirer chooses not to wield power does not prove it lacks power.’ ” (*Duffey, supra*, 31 Cal.App.5th at p. 257.)
- “Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because ‘[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent’s activities.’ ” (*Ayala, supra*, 59 Cal.4th at p. 531.)
- “The worker’s corresponding right to leave is similarly relevant: ‘ “An employee may quit, but an independent contractor is legally obligated to complete his contract.” ’ ” (*Ayala, supra*, 59 Cal.4th at p. 531 fn. 2.)
- “A finding of employment is supported where the workers are ‘a regular and integrated portion of [the] business operation.’ ” (*Garcia v. Seacon Logix Inc.* (2015) 238 Cal.App.4th 1476, 1487 [190 Cal.Rptr.3d 400].)
- “Where workers are paid weekly or by the hour, rather than by the job, it suggests an employment relationship.” (*Garcia, supra*, 238 Cal.App.4th at p. 1488.)
- “In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. . . . [¶] . . . [T]he rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms.” (*Ayala, supra*, 59 Cal.4th at p. 535.)
- “[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer’s desires only in the result of the work, and not the means by which it is achieved.” (*Jackson v. AEG Live, LLC* (2015) 233

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Cal.App.4th 1156, 1179 [183 Cal.Rptr.3d 394].)

- “[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], . . . the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor” (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)
- “Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other’s control, except with respect to his physical conduct, is both an agent and an independent contractor.” (*Jackson, supra*, 233 Cal.App.4th at p. 1184, original italics, internal citations omitted.)
- “[W]hen a statute refers to an ‘employee’ without defining the term, courts have generally applied the common law test of employment to that statute.” (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)
- “[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee.” (*Arnold, supra*, 202 Cal.App.4th at p. 589.)
- Restatement Second of Agency, section 220, provides:
 - (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.
 - (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
 - (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - (d) the skill required in the particular occupation;

- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 2–45

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.13 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, §§ 100A.25, 100A.34 (Matthew Bender)

1 California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

3720. Scope of Employment

[Name of plaintiff] must prove that *[name of agent]* was acting within the scope of *[his/her]* *[employment/authorization]* when *[name of plaintiff]* was harmed.

Conduct is within the scope of *[employment/authorization]* if:

- (a) It is reasonably related to the kinds of tasks that the *[employee/agent]* was employed to perform; or
 - (b) It is reasonably foreseeable in light of the employer's business or the *[agent's/employee's job]* responsibilities.
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New September 2003

Directions for Use

For an instruction on the scope of employment in cases involving on-duty peace officers, see CACI No. 3721, *Scope of Employment—Peace Officer's Misuse of Authority*.

This instruction is closely related to CACI No. 3723, *Substantial Deviation*, which focuses on when an act is not within the scope of employment.

Sources and Authority

- “The question of scope of employment is ordinarily one of fact for the jury to determine.” (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 221 [285 Cal.Rptr. 99, 814 P.2d 1341].)
- “The facts relating to the applicability of the doctrine of *respondeat superior* are undisputed in the instant case, and we conclude that as a matter of law the doctrine is applicable and that the trial court erred in its instructions in leaving the issue as one of fact to the jury.” (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 963 [88 Cal.Rptr. 188, 471 P.2d 988], original italics.)
- “The burden of proof is on the plaintiff to demonstrate that the negligent act was committed within the scope of his employment.” (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 721 [159 Cal.Rptr. 835, 602 P.2d 755].)
- “That the employment brought the tortfeasor and victim together in time and place is not enough . . . [T]he incident leading to injury must be an ‘outgrowth’ of the employment [or] the risk of tortious injury must be ‘inherent in the working environment’ or ‘typical of or broadly incidental to the enterprise [the employer] has undertaken.’ ” (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 298 [48 Cal.Rptr.2d 510, 907 P.2d 358], internal citations omitted.)
- “In California, the scope of employment has been interpreted broadly under the

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respondeat superior doctrine.” (*Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440].)

- “California courts have used different language when phrasing the test for scope of employment under the respondeat superior doctrine. (See Sources and Authority for CACI No. 3720 [scope of employment].)” (*Moreno v. Visser Ranch, Inc.* (2018) 30 Cal.App.5th 568, 576–577 [241 Cal.Rptr.3d 678].)
- “[R]espondeat superior liability attaches if the activities ‘that cause[d] the employee to become an instrumentality of danger to others’ were undertaken with the employer’s permission and were of some benefit to the employer or, in the absence of proof of benefit, the activities constituted a customary incident of employment.” (*Purton v. Marriott Internat., Inc.* (2013) 218 Cal.App.4th 499, 509 [159 Cal.Rptr.3d 912].)
- “Tortious conduct that violates an employee’s official duties or disregards the employer’s express orders may nonetheless be within the scope of employment. So may acts that do not benefit the employer, or are willful or malicious in nature.” (*Mary M., supra*, 54 Cal.3d at p. 209, internal citations omitted.)
- “A risk arises out of the employment when ‘in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business. In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one “that may fairly be regarded as typical of or broadly incidental” to the enterprise undertaken by the employer.’ Accordingly, the employer’s liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise.” (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 968 [227 Cal.Rptr. 106, 719 P.2d 676].)
- “California no longer follows the traditional rule that an employee’s actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer’s interests.” (*Lisa M., supra*, 12 Cal.4th at p. 297.)
- “*One way to determine* whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, ‘foreseeability’ in this context must be distinguished from ‘foreseeability’ as a test for negligence. In the latter sense ‘foreseeable’ means a level of probability which would lead a prudent person to take effective precautions whereas ‘foreseeability’ as a test for respondeat superior merely means that *in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business.*” (*Farmers Ins. Group, supra*, 11 Cal.4th at pp. 1003–1004, original italics.)
- “[T]he employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer’s enterprise creates inevitable risks as a part of doing business.” (*Moreno, supra*, 30 Cal.App.5th at p. 577.)

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- “The employment . . . must be such as predictably to create the risk employees will commit [torts] of the type for which liability is sought.” (*Lisa M.*, *supra*, 12 Cal.4th at p. 299.)
- “Some courts employ a two-prong test to determine whether an employee’s conduct was within the scope of his employment for purposes of respondeat superior liability, asking whether ‘“1) the act performed was either required or ‘incident to his duties’ [citation], or 2) the employee’s misconduct could be reasonably foreseen by the employer in any event [citation].’ ” [Citation.]’ ” (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 94 [162 Cal.Rptr.3d 752].)
- “[T]he fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment.” (*Moreno*, *supra*, 30 Cal.App.5th at p. 584.)
- “[I]n some cases, a cell phone call clearly would give rise to respondeat superior liability: ‘We envision the link between respondeat superior and most work-related cell phone calls while driving as falling along a continuum. Sometimes the link between the job and the accident will be clear, *as when an employee is on the phone for work at the moment of the accident.*’ ” (*Ayon v. Esquire Deposition Solutions, LLC* (2018) 27 Cal.App.5th 487, 495 [238 Cal.Rptr.3d 185], original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 186–205

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers’ Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer’s Liability for Employee’s Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

1 California Civil Practice: Torts § 3:8 (Thomson Reuters)

3725. Going-and-Coming Rule—Vehicle-Use Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer’s business, then the drive to and from work is within the scope of employment. The employer’s requirement may be either express or implied.

The drive to and from work may also be within the scope of employment if the use of the employee’s vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle’s use and expects the employee to make it available regularly. The employee’s agreement may be either express or implied.

New September 2003; Revised June 2014, May 2017, May 2019

Directions for Use

This instruction sets forth the vehicle use exception to the going-and-coming rule, sometimes called the required-vehicle exception. (See (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 398, fn. 6 [207 Cal.Rptr.3d 586]; see also *Pierson v. Helmerich & Payne International Drilling Co.* (2016) 4 Cal.App.5th 608, 624–630 [209 Cal.Rptr.3d 222 [vehicle-use exception encompasses two categories; required-vehicle and incidental-use, both of which are expressed within CACI No. 3725].) It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, commute time is within the scope of employment if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has reasonably come to rely on its use and to expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. (See *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301 [105 Cal.Rptr.3d 718].) Whether there is such a requirement or agreement can be a question of fact for the jury. (See *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 723 [159 Cal. Rptr. 835, 602 P.2d 755].)

Under this exception, the commute itself is considered the employer’s business. However, scope of employment may end if the employee substantially deviates from the commute route for personal reasons. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 899, 907–908 [162 Cal.Rptr.3d 280].) If substantial

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deviation is alleged, give CACI No. 3723, *Substantial Deviation*.

One court has stated that the employee must have been using the vehicle to do the employer’s business or provide a benefit for the employer *at the time of the accident*. (*Newland v. County of L.A.* (2018) 24 Cal.App.5th 676, 693 [234 Cal.App.3d 374], emphasis added.) However, many cases have applied the vehicle use exception without imposing this time-of-the-accident requirement. (See, e.g., *Moradi, supra*, 219 Cal.App.4th at p. 892 (employee was just going home at the time of the accident); *Lobo, supra*, 182 Cal.App.4th at p. 302 (same); *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803, 806–807 [99 Cal.Rptr. 666] (same); see also *Smith v. Workers’ Comp. Appeals Bd.* (1968) 69 Cal.2d 814, 815 [73 Cal.Rptr. 253, 447 P.2d 365] (workers’ compensation case: accident happened on the way to work).) *Newland* could be read as requiring the employee to need the vehicle for the employer’s business on the *day* of the accident, even if he or she was not engaged in the employer’s business at the *time* of the accident. (See *Newland, supra*, 24 Cal.App.5th at p. 696 [“no evidence that [employee] required a vehicle for work on the day of the accident, and no evidence that the [employer] received any direct or incidental benefit from [employee] driving to and from work that day”].)

Sources and Authority

- “ ‘An offshoot of the doctrine of respondeat superior is the so-called “going and coming rule.” Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. . . . This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. . . . ’ ” (*Jewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].)
- “The ‘required-vehicle’ exception to the going and coming rule and its variants have been given many labels. In *Halliburton, supra*, 220 Cal.App.4th 87, we used the phrase ‘incidental benefit exception’ as the equivalent of the required-vehicle exception. In *Felix v. Asai* (1987) 192 Cal.App.3d 926 [237 Cal. Rptr. 718] (*Felix*), we used the phrase ‘vehicle-use exception.’ The phrase ‘required-use doctrine’ also has been used. The ‘vehicle-use’ variant appears in the title to California Civil Jury Instruction (CACI) No. 3725, ‘Going-and-Coming Rule—Vehicle-Use Exception.’ The various labels and the wide range of circumstances they cover have the potential to create uncertainty about the factual elements of the exception—a topic of particular importance when reviewing a motion for summary judgment for triable issues of *material* fact. [¶] To structure our analysis of this exception, and assist the clear statement of the factual elements of its variants, we adopt the phrase ‘vehicle-use exception’ from *Felix* and CACI No. 3725 to describe the exception in its broadest form. Next, under the umbrella of the vehicle-use exception, we recognize two identifiable categories with different factual elements. We label those two

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categories as the ‘required-vehicle exception’ and ‘incidental benefit exception’ because those labels emphasize the factual difference between the two categories.” (*Pierson, supra*, 4 Cal.App.5th at pp. 624–625, original italics, internal citations omitted.)

- “Our division of the vehicle-use exception for purposes of this summary judgment motion should not be read as implying that this division is required, or even helpful, when presenting the scope of employment issue to a jury. The broad formulation of the vehicle-use exception in CACI No. 3725 correctly informs the jury that the issue of ultimate fact—namely, the scope of employment—may be proven in different ways.” (*Pierson, supra*, 4 Cal.App.5th at p. 625, fn. 4.)
- “The portion of CACI No. 3725 addressing an employer requirement states: ‘[I]f an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer’s business, then the drive to and from work is within the scope of employment. The employer’s requirement may be either express or implied.’ ” (*Pierson, supra*, 4 Cal.App.5th at p. 625.)
- “Our formulation of the incidental benefit exception is based on the part of CACI No. 3725 that states: ‘The drive to and from work may . . . be within the scope of employment if the use of the employee’s vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle’s use and expects the employee to make it available regularly.’ The ‘agreement may be either express or implied.’ The existence of an express or implied agreement can be a question of fact for the jury.” (*Pierson, supra*, 4 Cal.App.5th at p. 629.)
- “[W]hen a business enterprise requires an employee to drive to and from its office in order to have his vehicle available for company business during the day, accidents on the way to or from the office are statistically certain to occur eventually, and, the business enterprise having required the driving to and from work, the risk of such accidents are risks incident to the business enterprise.’ [¶] These holdings are the bases for the CACI instruction, the first paragraph of which tells the jury that the drive to and from work is within the scope of employment if the “employer requires [the] employee to drive to and from the workplace so that the vehicle is available for the employer’s business,” and the second paragraph, that the drive may be if ‘the use of the employee’s vehicle provides some direct or incidental benefit to the employer’ and ‘there may be a benefit to the employer if, one, the employee has [agreed] to make the vehicle available as an accommodation to the employer, and two, the employer has reasonably come to rely on the vehicle’s use and expect the employee to make it available regularly.’ (CACI No. 3725.)” (*Jorge, supra*, 3 Cal.App.5th at pp. 401–402, internal citation omitted.)
- “‘A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is

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whether there is an incidental benefit derived by the employer. [Citation.]’ . . . The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has ‘reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.’ ” (*Lobo, supra*, 182 Cal.App.4th at p. 297, original italics, internal citations omitted.)

- “ ‘To be sure, ordinary commuting is beyond the scope of employment Driving a required vehicle, however, is a horse of another color because it satisfies the control and benefit elements of respondeat superior. An employee who is required to use his or her own vehicle provides an “essential instrumentality” for the performance of the employer’s work. . . . When a vehicle must be provided by an employee, the employer benefits by not having to have available an office car and yet possessing a means by which off-site visits can be performed by its employees.’ ” (*Moradi, supra*, 219 Cal.App.4th at p. 899.)
- “When an employer requires an employee to use a personal vehicle, it exercises meaningful control over the method of the commute by compelling the employee to forswear the use of carpooling, walking, public transportation, or just being dropped off at work.” (*Moradi, supra*, 219 Cal.App.4th at p. 899.)
- “The cases invoking the required-vehicle exception all involve employees whose jobs entail the regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business.” (*Tryer v. Ojai Valley School Dist.* (1992) 9 Cal.App.4th 1476, 1481 [12 Cal.Rptr.2d 114].)
- “[N]ot all benefits to the employer are of the type that satisfy the incidental benefits exception. The requisite benefit must be one that is ‘not common to commute trips by ordinary members of the work force.’ Thus, employers benefit when employees arrive at work on time, but this benefit is insufficient to satisfy the incidental benefits exception. An example of a sufficient benefit is where an employer enlarges the available labor market by providing travel expenses and paying for travel time.” (*Pierson, supra*, 4 Cal.App.5th at p. 630.)
- “Where the incidental benefit exception applies, the employee’s commute directly between work and home is considered to be within the scope of employment for respondeat superior purposes. Minor deviations from a direct commute are also included, but there is no respondeat superior liability if the employee substantially departs from the employer’s business or is engaged in a purely personal activity at the time of the tortious injury.” (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 97 [162 Cal.Rptr.3d 752].)
- “Here, the required vehicle exception to the going and coming rule, not the special errand exception, governs our analysis. Accordingly, we have not

applied the six factors used in special errand cases to determine whether [employee] was acting within the scope of her employment at the time of the accident. [¶] Rather, we have applied the relevant principles under the required vehicle exception. Those principles differ from the six factors used to determine whether the special errand exception applies. In the present case, [employer] required [employee] to use her personal vehicle to travel to and from the office and other destinations. She also had to use her personal vehicle before, during, and after regular work hours to develop new business. We have properly examined whether [employee]’s use of her personal vehicle conferred an incidental benefit on [employer]—it did; whether her planned stops at the frozen yogurt shop and the yoga studio were an unforeseeable, substantial departure from her commute—they were not; whether they were a foreseeable, minor deviation from her regular commute—they were; whether they were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer’s business—they were not; and whether they were necessary for [employee]’s comfort, convenience, health, and welfare—they were.” (*Moradi, supra*, 219 Cal.App.4th at pp. 907–908.)

- “One exception to the going and coming rule has been recognized when the commute involves ‘“an incidental benefit to the employer, not common to commute trips by ordinary members of the work force.” [Citation.]’ When the employer incidentally benefits from the employee’s commute, that commute may become part of the employee’s workday for the purposes of respondeat superior liability. [¶] The incidental benefit exception has been applied when the employer furnishes, or requires the employee to furnish, a vehicle for transportation on the job, and the negligence occurs while the employee is traveling to or from work in that vehicle.” (*Halliburton Energy Services, Inc., supra*, 220 Cal.App.4th at p. 96, internal citation omitted.)
- “[T]he employer benefits when a vehicle is available to the employee during off-duty hours in case it is needed for emergency business trips.” (*Moreno v. Visser Ranch, Inc.* (2018) 30 Cal.App.5th 568, 580 [241 Cal.Rptr.3d 678].)
- “Public policy would be ill-served by a rule establishing 24-hour employer liability for on-call employees, regardless of the nature of the employee’s activities at the time of an accident.” (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1610 [26 Cal.Rptr.2d 749].)
- “[T]he trier of fact remains free to determine in a particular case that the employee’s use of his or her vehicle was too infrequent to confer a sufficient benefit to the employer so as to make it reasonable to require the employer to bear the cost of the employee’s negligence in operating the vehicle. This is particularly true in the absence of an express requirement that the employee make his or her vehicle available for the employer’s benefit or evidence that the employer actually relied on the availability of the employee’s car to further the employer’s purposes.” (*Lobo v. Tamco* (2014) 230 Cal.App.4th 438, 447 [178 Cal.Rptr.3d 515].)
- “Whether the transit is part of the employment relationship tends to be a more

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subtle issue than whether the transit was between home and work. . . . ‘These are the extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own. When the employer gains that kind of a particular advantage, the job does more than call for routine transport to it; it plays a different role, bestowing a special benefit upon the employer by reason of the extraordinary circumstances. The employer’s special request, his imposition of an unusual condition, removes the transit from the employee’s choice or convenience and places it within the ambit of the employer’s choice or convenience, restoring the employer-employee relationship.’ ” (*Zhu v. Workers’ Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038–1039 [219 Cal.Rptr.3d 630].)

- “Liability may be imposed on an employer for an employee’s tortious conduct while driving to or from work, if at the time of the accident, the employee’s use of a personal vehicle was required by the employer or otherwise provided a benefit to the employer.” (*Newland, supra*, 24 Cal.App.5th at p. 679.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 195

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, Part II *Theories Of Recovery—Vicarious Liability*, ¶ 2:803 (The Rutter Group)

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.42[3][d] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers’ Tort Liability to Third Parties for Conduct of Employees*, § 30.05[4][a] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer’s Liability for Employee’s Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 3:10 (Thomson Reuters)

3940. Punitive Damages—Individual Defendant—Trial Not Bifurcated

If you decide that *[name of defendant]*'s conduct caused *[name of plaintiff]* harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages only if *[name of plaintiff]* proves by clear and convincing evidence that *[name of defendant]* engaged in that conduct with malice, oppression, or fraud.

“Malice” means that *[name of defendant]* acted with intent to cause injury or that *[name of defendant]*'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

“Oppression” means that *[name of defendant]*'s conduct was despicable and subjected *[name of plaintiff]* to cruel and unjust hardship in knowing disregard of *[his/her]* rights.

“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

“Fraud” means that *[name of defendant]* intentionally misrepresented or concealed a material fact and did so intending to harm *[name of plaintiff]*.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

- (a) How reprehensible was *[name of defendant]*'s conduct? In deciding how reprehensible *[name of defendant]*'s conduct was, you may consider, among other factors:
 1. Whether the conduct caused physical harm;
 2. Whether *[name of defendant]* disregarded the health or safety of others;
 3. Whether *[name of plaintiff]* was financially weak or vulnerable and *[name of defendant]* knew *[name of plaintiff]* was financially weak or vulnerable and took advantage of *[him/her/it]*;

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- 4. Whether [name of defendant]’s conduct involved a pattern or practice; and**
 - 5. Whether [name of defendant] acted with trickery or deceit.**
- (b) Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]’s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that [name of defendant] knew was likely to occur because of [his/her/its] conduct]?**
- (c) In view of [name of defendant]’s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]’s ability to pay.]**

[Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *Highly Probable—Clear and Convincing Proof*.

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, if damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her

estate’s recovery of emotional distress damages]), or if the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given where an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant’s conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

“A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word “misrepresentation” is used in the instruction’s definition of “fraud.”

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the

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extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- “An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.” (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- “The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.” (*Neal, supra*, 21 Cal.3d at p. 928, fn. 13.)
- “Punitive damages are to be assessed in an amount which, depending upon the defendant’s financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff ‘whole,’ punitive damages are a ‘windfall’ form of recovery.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- “It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective.” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)
- “ ‘A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammelled discretion, has made the award.’ ” (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)
- “In light of our holding that evidence of a defendant’s financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant’s

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financial condition, such evidence is ‘essential to the claim for relief.’ ” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- “A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal.” (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)
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- “While ‘there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,’ net worth is often described as ‘the critical determinant of financial condition.’ [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant’s financial condition; a selective presentation of financial condition evidence will not survive scrutiny.” (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)
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- “[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant’s acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other

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factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra*, 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra*, 549 U.S. at p. 353.)
- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra*, 549 U.S. at p. 355.)
- "'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)
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blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.’ ” (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- “[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant’s conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue.” (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)
- “ ‘[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.’ We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)
- “[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant’s conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability.” (*Bullock, supra*, 198 Cal.App.4th at p. 562, internal citation omitted.)
- “[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the

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amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1" (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- “Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 425, internal citation omitted.)
- “In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered.” (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)
- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 427, internal citation omitted.)
- “[I]n some cases, the defendant’s financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]” (*Nickerson v. Stonebridge Life Ins. Co. (Nickerson II)* (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)
- “In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury.” (*Gagnon*, *supra*, 211 Cal.App.3d at p. 1605.)
- “Under the statute, ‘malice does not require actual intent to harm. [Citation.]

Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]” (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- “Used in its ordinary sense, the adjective ‘despicable’ is a powerful term that refers to circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’ As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, ‘malice’ requires more than a ‘willful and conscious’ disregard of the plaintiffs’ interests. The additional component of ‘despicable conduct’ must be found.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 725, internal citations omitted.)
- “We conclude that the rule . . . that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)
- “With the focus on the plaintiff’s injury rather than the amount of compensatory damages, the [‘reasonable relation’] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)
- “The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1727, 1729, 1731, 1743–1748, 1780–1796

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.01–54.06, 54.20–54.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

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6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3942. Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff*] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

- (a) How reprehensible was [*name of defendant*]’s conduct? In deciding how reprehensible [*name of defendant*]’s conduct was, you may consider, among other factors:
 1. Whether the conduct caused physical harm;
 2. Whether [*name of defendant*] disregarded the health or safety of others;
 3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it];
 4. Whether [*name of defendant*]’s conduct involved a pattern or practice; and
 5. Whether [*name of defendant*] acted with trickery or deceit.
- (b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]’s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/its] conduct]?
- (c) In view of [*name of defendant*]’s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]’s ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name*

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of plaintiff].]

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, if damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or if the harm caused by defendant’s acts could have been great but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant’s conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

“A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that “[p]unitive damages previously imposed for the same

conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Evidence of Profits or Financial Condition. Civil Code section 3295(d).
- “[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants’ financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of ‘oppression, fraud or malice,’ in accordance with Civil Code section 3294.” (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- “Evidence of the defendant’s financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295.” (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)
- “[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused.” (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- “The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.” (*Neal, supra*, 21 Cal.3d at p. 928, fn. 13.)
- “Punitive damages are to be assessed in an amount which, depending upon the defendant’s financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff ‘whole,’ punitive damages are a ‘windfall’ form of recovery.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

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- “It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective.” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)
- “ ‘A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammelled discretion, has made the award.’ ” (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)
- “In light of our holding that evidence of a defendant’s financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant’s financial condition, such evidence is ‘essential to the claim for relief.’ ” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)
- “A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal.” (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)
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- “While ‘there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,’ net worth is often described as ‘the critical determinant of financial condition.’ [¶]

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- “ ‘Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct’ This does not mean, however, that the defendant’s similar wrongful conduct toward others should not be considered in determining the amount of punitive damages.” (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)
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- “[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant’s conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability.” (*Bullock*, *supra*, 198 Cal.App.4th at p. 562, internal citation omitted.)
- “[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at pp. 424–425, internal citation omitted.)
- “Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 425, internal citation omitted.)
- “In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered.” (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

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- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 427, internal citation omitted.)
- “[I]n some cases, the defendant’s financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]” (*Nickerson v. Stonebridge Life Ins. Co. (Nickerson II)* (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)
- “In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)
- “We conclude that the rule . . . that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)
- “With the focus on the plaintiff’s injury rather than the amount of compensatory damages, the [‘reasonable relation’] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)
- “The high court in *TXO [TXO Production Corp., supra]* and *BMW [BMW of North America, Inc. v. Gore]* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1727, 1729, 1731, 1743–1748, 1780–1796

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12,

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14.37–14.39

4 Levy et al., *California Torts*, Ch. 54, *Punitive Damages*, §§ 54.20–54.25
(Matthew Bender)

15 *California Forms of Pleading and Practice*, Ch. 177, *Damages*, § 177.51
(Matthew Bender)

6 *California Points and Authorities*, Ch. 64, *Damages: Tort*, §§ 64.141 et seq.,
64.174 et seq. (Matthew Bender)

3943. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated

If you decide that *[name of employee/agent]*'s conduct caused *[name of plaintiff]* harm, you must decide whether that conduct justifies an award of punitive damages against *[name of defendant]* for *[name of employee/agent]*'s conduct. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against *[name of defendant]* for *[name of employee/agent]*'s conduct only if *[name of plaintiff]* proves by clear and convincing evidence that *[name of employee/agent]* engaged in that conduct with malice, oppression, or fraud.

“Malice” means that *[name of employee/agent]* acted with intent to cause injury or that *[name of employee/agent]*'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

“Oppression” means that *[name of employee/agent]*'s conduct was despicable and subjected *[name of plaintiff]* to cruel and unjust hardship in knowing disregard of *[his/her]* rights.

“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

“Fraud” means that *[name of employee/agent]* intentionally misrepresented or concealed a material fact and did so intending to harm *[name of plaintiff]*.

[Name of plaintiff] must also prove **[one of]** the following by clear and convincing evidence:

1. **[That *[name of employee/agent]* was an officer, a director, or a managing agent of *[name of defendant]*, who was acting on behalf of *[name of defendant]*; [or]]**
2. **[That an officer, a director, or a managing agent of *[name of defendant]* had advance knowledge of the unfitness of *[name of employee/agent]* and employed *[him/her]* with a knowing disregard of the rights or safety of others; [or]]**
3. **[That an officer, a director, or a managing agent of *[name of defendant]* authorized *[name of employee/agent]*'s conduct; [or]]**
4. **[That an officer, a director, or a managing agent of *[name of***

defendant] knew of [*name of employee/agent*]’s wrongful conduct and adopted or approved the conduct after it occurred.]

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

- (a) How reprehensible was [*name of defendant*]’s conduct? In deciding how reprehensible [*name of defendant*]’s conduct was, you may consider, among other factors:
 1. Whether the conduct caused physical harm;
 2. Whether [*name of defendant*] disregarded the health or safety of others;
 3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it];
 4. Whether [*name of defendant*]’s conduct involved a pattern or practice; and
 5. Whether [*name of defendant*] acted with trickery or deceit.
- (b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]’s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/its] conduct]?
- (c) In view of [*name of defendant*]’s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]’s ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

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New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*. When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, or managing agents, use CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *Highly Probable—Clear and Convincing Proof*.

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, if damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or if the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant’s conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual*

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Automobile Insurance Co. v. Campbell (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

“A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word “misrepresentation” is used in the instruction’s definition of “fraud.”

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- “[E]vidence of ratification of [agent’s] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “Subdivision (b) is not a model of clarity, but in light of California’s history of employer liability for punitive damages and of the Legislature’s reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty

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of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- “ ‘California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.’ The ‘additional’ burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b).” (*Weeks, supra*, 63 Cal.App.4th at p. 1154, internal citation omitted.)
- “Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee’s wrongful conduct. It authorizes an award of punitive damages against an employer for the employer’s own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee.” (*Weeks, supra*, 63 Cal.App.4th at pp. 1154–1155.)
- “An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.” (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- “ ‘[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.’ We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any

award suspect.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 419, internal citation omitted.)

- “[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant’s conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability.” (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)
- “[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at pp. 424–425, internal citation omitted.)
- “Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 425, internal citation omitted.)
- “In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered.” (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA*, *supra*, 549 U.S. at p. 353.)
- “Evidence of actual harm to nonparties can help to show that the conduct that

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harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Philip Morris USA, supra*, 549 U.S. at p. 355.)

- “ ‘Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct’ This does not mean, however, that the defendant’s similar wrongful conduct toward others should not be considered in determining the amount of punitive damages.” (*Bullock, supra*, 198 Cal.App.4th at p. 560.)
- “ ‘Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant’s similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. . . . ‘[T]o consider the defendant’s entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff’s lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, “ ‘a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one.’ ” By placing the defendant’s conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.’ ” (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)
- “[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant’s conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the

reprehensibility factors rather than in connection with the reasonable relationship issue.” (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- “In light of our holding that evidence of a defendant’s financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant’s financial condition, such evidence is ‘essential to the claim for relief.’ ” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)
- “A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal.” (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)
- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra*, 54 Cal.3d at p. 112.)
- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra*, 54 Cal.3d at p. 112, internal citations omitted.)
- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- “While ‘there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,’ net worth is often described as ‘the critical determinant of financial condition.’ [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant’s financial condition; a selective presentation of financial condition evidence will not survive scrutiny.” (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)
- “[N]et worth is not the only measure of a defendant’s wealth for punitive damages purposes that is recognized by the California courts. ‘Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.’ ” (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)
- “[T]he ‘net’ concept of the net worth metric remains critical. ‘In most cases,

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evidence of earnings or profit alone are not sufficient “without examining the liabilities side of the balance sheet.” [Citations.]” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)

- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 427, internal citation omitted.)
- “[I]n some cases, the defendant’s financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]” (*Nickerson v. Stonebridge Life Ins. Co. (Nickerson II)* (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)
- “[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- “Subdivision (b) . . . governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice.” (*Weeks, supra*, 63 Cal.App.4th at p. 1137.)
- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization’s representative, not in some other capacity.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723.)
- The concept of “managing agent” “assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723.)
- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties therein.” (*College Hospital, Inc., supra*, 8 Cal.4th at pp. 723–724.)
- “[T]he determination of whether certain employees are managing agents ‘does

not necessarily hinge on their ‘level’ in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions” (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- “Although it is generally true, . . . that an employee’s hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee’s hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation.” (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)
- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee’s discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis.” (*White, supra*, 21 Cal.4th at pp. 566–567.)
- “In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation’s business.” (*White, supra*, 21 Cal.4th at p. 577.)
- “[C]orporate policy’ is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A ‘managing agent’ is one with substantial authority over decisions that set these general principles and rules.” (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- “The key inquiry thus concerns the employee’s authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status.” (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)
- “[R]atification’ is the [c]onfirmation and acceptance of a previous act.’ A corporation cannot confirm and accept that which it does not actually know about.” (*Cruz, supra*, 83 Cal.App.4th at p. 168, internal citations omitted.)
- “For purposes of determining an employer’s liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726.)
- “Corporate ratification in the punitive damages context requires actual

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knowledge of the conduct and its outrageous nature.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 726.)

- “The high court in *TXO* [*TXO Production Corp.*, *supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.20–14.23, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3945. Punitive Damages—Entity Defendant—Trial Not Bifurcated

If you decide that *[name of defendant]*'s conduct caused *[name of plaintiff]* harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against *[name of defendant]* only if *[name of plaintiff]* proves that *[name of defendant]* engaged in that conduct with malice, oppression, or fraud. To do this, *[name of plaintiff]* must prove [one of] the following by clear and convincing evidence:

1. [That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of *[name of defendant]*, who acted on behalf of *[name of defendant]*; [or]]
2. [That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of *[name of defendant]*; [or]]
3. [That one or more officers, directors, or managing agents of *[name of defendant]* knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]

“Malice” means that *[name of defendant]* acted with intent to cause injury or that *[name of defendant]*'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

“Oppression” means that *[name of defendant]*'s conduct was despicable and subjected *[name of plaintiff]* to cruel and unjust hardship in knowing disregard of [his/her] rights.

“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

“Fraud” means that *[name of defendant]* intentionally misrepresented or concealed a material fact and did so intending to harm *[name of plaintiff]*.

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately determine corporate policy.

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There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

- (a) How reprehensible was [name of defendant]’s conduct? In deciding how reprehensible [name of defendant]’s conduct was, you may consider, among other factors:**
 - 1. Whether the conduct caused physical harm;**
 - 2. Whether [name of defendant] disregarded the health or safety of others;**
 - 3. Whether [name of plaintiff] was financially weak or vulnerable and [name of defendant] knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/it];**
 - 4. Whether [name of defendant]’s conduct involved a pattern or practice; and**
 - 5. Whether [name of defendant] acted with trickery or deceit.**
- (b) Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]’s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that [name of defendant] knew was likely to occur because of [his/her/its] conduct]?**
- (c) In view of [name of defendant]’s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]’s ability to pay.]**

[Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].]

New September 2004; Revised April 2004, June 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, or managing agents. When the plaintiff seeks to hold an employer or principal liable

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for the conduct of a specific employee or agent, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *Highly Probable—Clear and Convincing Proof*.

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, if damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or if the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant’s conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

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“A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word “misrepresentation” is used in the instruction’s definition of “fraud.”

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525].) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- “[E]vidence of ratification of [agent’s] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.” (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- “[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.’ We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 419, internal citation omitted.)
- “[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant’s conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability.” (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)
- “[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at pp. 424–425, internal citation omitted.)
- “Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 425, internal citation omitted.)
- “In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of

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punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered.” (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA, supra*, 549 U.S. at p. 353.)
- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Philip Morris USA, supra*, 549 U.S. at p. 355.)
- “ ‘Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . . ’ This does not mean, however, that the defendant’s similar wrongful conduct toward others should not be considered in determining the amount of punitive damages.” (*Bullock, supra*, 198 Cal.App.4th at p. 560.)
- “Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant’s similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. . . . ‘[T]o consider the defendant’s entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff’s lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, “ ‘a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one.’ ” . . . By placing the defendant’s conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.’ ” (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 987 [180 Cal.Rptr.3d 382], internal citations omitted.)
- “[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence

and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.'" (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)
- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)
- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra*, 54 Cal.3d at p. 112.)
- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra*, 54 Cal.3d at p. 112, internal citations omitted.)
- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- "While 'there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,' net worth is often described as 'the critical determinant of financial condition.' [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant's financial condition; a selective presentation of financial condition

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evidence will not survive scrutiny.” (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)

- “[N]et worth is not the only measure of a defendant’s wealth for punitive damages purposes that is recognized by the California courts. ‘Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.’ ” (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)
- “[T]he ‘net’ concept of the net worth metric remains critical. ‘In most cases, evidence of earnings or profit alone are not sufficient “without examining the liabilities side of the balance sheet.” [Citations.]’ ” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)
- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 427, internal citation omitted.)
- “[I]n some cases, the defendant’s financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]” (*Nickerson v. Stonebridge Life Ins. Co. (Nickerson II)* (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)
- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization’s representative, not in some other capacity.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- “[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723.)
- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties therein.” (*College Hospital, Inc., supra*, 8 Cal.4th at pp. 723–724.)
- “[T]he determination of whether certain employees are managing agents ‘ “does not necessarily hinge on their ‘level’ in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions” ’ ” (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor*

Corp., U.S.A. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- “Although it is generally true . . . that an employee’s hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee’s hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation.” (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)
- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee’s discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis.” (*White, supra*, 21 Cal.4th at pp. 566–567.)
- “In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation’s business.” (*White, supra*, 21 Cal.4th at p. 577.)
- “[C]orporate policy’ is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A ‘managing agent’ is one with substantial authority over decisions that set these general principles and rules.” (*Cruz v. Homepage* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- “The key inquiry thus concerns the employee’s authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status.” (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)
- “The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756
 Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

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California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3947. Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated

If you decide that *[name of individual defendant]*'s or *[name of entity defendant]*'s conduct caused *[name of plaintiff]* harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against *[name of individual defendant]* only if *[name of plaintiff]* proves by clear and convincing evidence that *[name of individual defendant]* engaged in that conduct with malice, oppression, or fraud.

You may award punitive damages against *[name of entity defendant]* only if *[name of plaintiff]* proves that *[name of entity defendant]* acted with malice, oppression, or fraud. To do this, *[name of plaintiff]* must prove [one of] the following by clear and convincing evidence:

1. [That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of *[name of entity defendant]*, who acted on behalf of *[name of entity defendant]*; [or]]
2. [That an officer, a director, or a managing agent of *[name of entity defendant]* had advance knowledge of the unfitness of *[name of individual defendant]* and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]
3. [That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of *[name of entity defendant]*; [or]]
4. [That one or more officers, directors, or managing agents of *[name of entity defendant]* knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]

“Malice” means that a defendant acted with intent to cause injury or that a defendant’s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

“Oppression” means that a defendant’s conduct was despicable and subjected *[name of plaintiff]* to cruel and unjust hardship in knowing disregard of [his/her] rights.

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“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

“Fraud” means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [name of plaintiff].

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

- (a) How reprehensible was that defendant’s conduct? In deciding how reprehensible a defendant’s conduct was, you may consider, among other factors:**
 - 1. Whether the conduct caused physical harm;**
 - 2. Whether the defendant disregarded the health or safety of others;**
 - 3. Whether [name of plaintiff] was financially weak or vulnerable and the defendant knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her];**
 - 4. Whether the defendant’s conduct involved a pattern or practice; and**
 - 5. Whether the defendant acted with trickery or deceit.**
- (b) Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]’s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that the defendant knew was likely to occur because of [his/her/its] conduct]?**
- (c) In view of that defendant’s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant’s ability to pay.]**

[Punitive damages may not be used to punish a defendant for the

impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended to apply if punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When punitive damages are sought against an individual defendant, use CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *Highly Probable—Clear and Convincing Proof*.

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, if damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or if the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant’s conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may

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be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

“A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word “misrepresentation” is used in the instruction’s definition of “fraud.”

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens*, *supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- “[E]vidence of ratification of [agent’s] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “Subdivision (b) is not a model of clarity, but in light of California’s history of employer liability for punitive damages and of the Legislature’s reasons for enacting subdivision (b), we have no doubt that it does no more than codify and

refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- “ ‘California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.’ The ‘additional’ burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b).” (*Weeks, supra*, 63 Cal.App.4th at p. 1154, internal citation omitted.)
- “Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee’s wrongful conduct. It authorizes an award of punitive damages against an employer for the employer’s own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee.” (*Weeks, supra*, 63 Cal.App.4th at pp. 1154–1155.)
- “ ‘[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.’ We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.) “[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant’s conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that

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vulnerability.” (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- “[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at pp. 424–425, internal citation omitted.)
- “Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 425, internal citation omitted.)
- “In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered.” (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA*, *supra*, 549 U.S. at p. 353.)
- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on

nonparties.” (*Philip Morris USA, supra*, 549 U.S. at p. 355.)

- “ ‘Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . . ’ This does not mean, however, that the defendant’s similar wrongful conduct toward others should not be considered in determining the amount of punitive damages.” (*Bullock, supra*, 198 Cal.App.4th at p. 560.)
- “Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant’s similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. . . . ‘[T]o consider the defendant’s entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff’s lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, “ ‘ ‘a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one.’ ” . . . By placing the defendant’s conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.’ ” (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)
- “[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant’s conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue.” (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)
- “In light of our holding that evidence of a defendant’s financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff

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seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' ” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- “A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal.” (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)
- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra*, 54 Cal.3d at p. 112.)
- “[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay.” (*Adams, supra*, 54 Cal.3d at p. 112, internal citations omitted.)
- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- “While ‘there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,’ net worth is often described as ‘the critical determinant of financial condition.’ [¶] A plaintiff seeking punitive damages must provide a balanced overview of the defendant's financial condition; a selective presentation of financial condition evidence will not survive scrutiny.” (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)
- “[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. ‘Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.’ ” (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)
- “[T]he ‘net’ concept of the net worth metric remains critical. ‘In most cases, evidence of earnings or profit alone are not sufficient “without examining the liabilities side of the balance sheet.” [Citations.]’ ” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)
- “The decision to award punitive damages is exclusively the function of the trier

of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 427, internal citation omitted.)
- “[I]n some cases, the defendant’s financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]” (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)
- “An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.” (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- “[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- “Subdivision (b) . . . governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice.” (*Weeks*, *supra*, 63 Cal.App.4th at p. 1137.)
- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization’s representative, not in some other capacity.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 723.)
- “[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 723.)
- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties

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therein.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at pp. 723–724.)

- “[T]he determination of whether certain employees are managing agents ‘ ‘does not necessarily hinge on their ‘level’ in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions ’ ’ ” (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)
- “Although it is generally true . . . that an employee’s hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee’s hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation.” (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)
- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee’s discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis.” (*White, supra*, 21 Cal.4th at pp. 566–567.)
- “In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation’s business.” (*White, supra*, 21 Cal.4th at p. 577.)
- “ ‘[C]orporate policy’ is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A ‘managing agent’ is one with substantial authority over decisions that set these general principles and rules.” (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- “The key inquiry thus concerns the employee’s authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status.” (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)
- “ ‘[R]atification’ is the ‘[c]onfirmation and acceptance of a previous act.’ A corporation cannot confirm and accept that which it does not actually know about.” (*Cruz, supra*, 83 Cal.App.4th at p. 168.)
- “For purposes of determining an employer’s liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or

malicious behavior by an employee in the performance of his job duties.”
(*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 726.)

- “Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 726.)
- “The high court in *TXO* [*TXO Production Corp.*, *supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

**3949. Punitive Damages—Individual and Corporate Defendants
(Corporate Liability Based on Acts of Named
Individual)—Bifurcated Trial (Second Phase)**

You must now decide the amount, if any, that you should award [*name of plaintiff*] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

- (a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:
 - 1. Whether the conduct caused physical harm;
 - 2. Whether the defendant disregarded the health or safety of others;
 - 3. Whether [*name of plaintiff*] was financially weak or vulnerable and the defendant knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it];
 - 4. Whether the defendant's conduct involved a pattern or practice; and
 - 5. Whether the defendant acted with trickery or deceit.
- (b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that the defendant knew was likely to occur because of [his/her/its] conduct]?
- (c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish a defendant for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, if damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or if the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant’s conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

“A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to

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sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Evidence of Profits or Financial Condition. Civil Code section 3295(d).
- “[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants’ financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of ‘oppression, fraud or malice,’ in accordance with Civil Code section 3294.” (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- “Evidence of the defendant’s financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295.” (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)
- “[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused.” (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- “The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.” (*Neal, supra*, 21 Cal.3d at p. 928, fn. 13.)
- “Punitive damages are to be assessed in an amount which, depending upon the defendant’s financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff ‘whole,’ punitive damages are a ‘windfall’ form of recovery.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- “It follows that the wealthier the wrongdoing defendant, the larger the award of

exemplary damages need be in order to accomplish the statutory objective.” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- “ ‘A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammelled discretion, has made the award.’ ” (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citations omitted.)
- “In light of our holding that evidence of a defendant’s financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant’s financial condition, such evidence is ‘essential to the claim for relief.’ ” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)
- “A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal.” (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)
- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra*, 54 Cal.3d at p. 112.)
- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra*, 54 Cal.3d at p. 112, internal citations omitted.)
- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- “While ‘there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,’ net worth is often described as ‘the critical determinant of financial condition.’ [¶] A plaintiff seeking punitive damages must provide a balanced overview of the

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defendant's financial condition; a selective presentation of financial condition evidence will not survive scrutiny.” (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648 [245 Cal.Rptr.3d 608], internal citation omitted.)

- “[N]et worth is not the only measure of a defendant’s wealth for punitive damages purposes that is recognized by the California courts. ‘Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.’ ” (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)
- “[T]he ‘net’ concept of the net worth metric remains critical. ‘In most cases, evidence of earnings or profit alone are not sufficient “without examining the liabilities side of the balance sheet.” [Citations.]’ ” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)
- “[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant’s acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant’s wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.” (*Neal, supra*, 21 Cal.3d at p. 928, internal citations and footnote omitted.)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA, supra*, 549 U.S. at p. 353.)
- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Philip Morris USA, supra*, 549 U.S. at p. 355.)
- “ ‘Due process does not permit courts, in the calculation of punitive damages,

to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. . . . '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' . . . By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)
- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)
- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious

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conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 419, internal citation omitted.)

- “[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant’s conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability.” (*Bullock*, *supra*, 198 Cal.App.4th at p. 562, internal citation omitted.)
- “[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at pp. 424–425, internal citation omitted.)
- “Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 425, internal citation omitted.)
- “In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered.” (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)
- “The decision to award punitive damages is exclusively the function of the trier

of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 427, internal citation omitted.)
- “[I]n some cases, the defendant’s financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]” (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)
- “In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)
- “We conclude that the rule . . . that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)
- “With the focus on the plaintiff’s injury rather than the amount of compensatory damages, the [‘reasonable relation’] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)
- “The high court in *TXO* [*TXO Production Corp.*, *supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.21, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d]

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(Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51

(Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq.,
64.174 et seq. (Matthew Bender)

4107. Duty of Disclosure by Real Estate Broker to Client

As a fiduciary, a real estate broker must disclose to his or her client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction.

The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of the transaction, the knowledge and experience of the client, the questions asked by the client, the nature of the property, and the terms of sale. The broker must place himself or herself in the position of the client and consider the type of information required for the client to make a well-informed decision.

[A real estate broker cannot accept information received from another person, such as the seller, as being true, and transmit it to his or her client without either verifying the information or disclosing to the client that the information has not been verified.]

New April 2008; Revised December 2012, June 2013

Directions for Use

This instruction may be read after CACI No. 4101, *Failure to Use Reasonable Care—Essential Factual Elements*, if a real estate broker's duty of disclosure to the broker's own client is at issue. Give the second paragraph if relevant to the facts of the case. For an instruction based on a broker's breach of duty to the buyer with regard to the property inspection required by Civil Code section 2079, see CACI No. 4108, *Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements*.

While a broker's fiduciary duty to the client arises from the relationship and not from contract (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 [139 Cal.Rptr.3d 670]), the scope of the duty may be limited by contract. (See *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 750–751 [17 Cal.Rptr.2d 734] [broker-client agreement may relieve broker of any duty to provide tax advice].) Any contractual limitations may be added to the second paragraph regarding what facts a broker must learn.

Sources and Authority

- “Under the common law, . . . a broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. ‘The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The

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agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. [¶] . . . [¶] The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of each transaction, the knowledge and the experience of the principal, the questions asked by the principal, and the nature of the property and the terms of sale. The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision. This obligation requires investigation of facts not known to the agent and disclosure of all material facts that might reasonably be discovered.' ” (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25–26 [73 Cal.Rptr.2d 784], internal citations omitted.)

- “A fiduciary must tell its principal of all information it possesses that is material to the principal's interests. A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent. (*Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797], internal citations omitted.)
- “ ‘[W]here the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. . . .’ When the seller's real estate agent or broker is also aware of such facts, ‘he [or she] is under the same duty of disclosure.’ ” (*Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1518–1519 [116 Cal.Rptr.3d 419], internal citations omitted.)
- “ ‘A broker who is merely an innocent conduit of the seller's fraud may be innocent of actual fraud [citations], but in this situation the broker may be liable for negligence on a constructive fraud theory if he or she passes on the misstatements as true without personally investigating them.’ ” (*Salahutdin v. Valley of Cal.* (1994) 24 Cal.App.4th 555, 562 [29 Cal.Rptr.2d 463].)
- “[T]he broker has a fiduciary duty to investigate the material facts of the transaction, and he cannot accept information received from others as being true, and transmit it to the principal, without either verifying the information or disclosing to the principal that the information has not been verified. Because of the fiduciary obligations of the broker, the principal has a right to rely on the statements of the broker, and if the information is transmitted by the broker without verification and without qualification, the broker is liable to the principal for negligent misrepresentation.” (*Salahutdin, supra*, 24 Cal.App.4th at pp. 562–563.)
- “[T]he fiduciary duty owed by brokers to their own clients is substantially more extensive than the *nonfiduciary* duty codified in [Civil Code] section 2079 [duty to visually inspect and disclose material facts].” (*Michel, supra*, 156 Cal.App.4th at p. 763, original italics.)
- “The statutory duties owed by sellers' brokers under section 2079 are separate

and independent of the duties owed by brokers to their own clients who are buyers.” (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1305 [139 Cal.Rptr.3d 670].)

- “[W]e are not persuaded by Defendants’ reliance on Civil Code section 2079. Although we agree that that statute sets forth some of the duties of a real estate broker, it is not the only source of a broker’s duties. ‘Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency.’ Here, the [plaintiffs]’ claims are not contingent on an expansion of the statutorily defined duties of a real estate broker. Instead, their claim is more elementary. If a real estate broker has information that will adversely affect the value of a property he or she is selling, does that broker have a duty to share that information with his or her client? The clear and uncontroversial answer to that question is yes.” (*Ryan v. Real Estate of the Pacific, Inc.* (2019) 32 Cal.App.5th 637, 646 [244 Cal.Rptr.3d 129], internal citation omitted.)
- “[Fiduciary] duties require full and complete disclosure of all material facts respecting the property or relating to the transaction in question.” (*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1286 [63 Cal.Rptr.2d 373].)
- “Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency.” (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 164 [11 Cal.Rptr.3d 564].)
- “[R]eal estate brokers representing buyers of residential property are licensed professionals who owe fiduciary duties to their own clients. As such, this fiduciary duty is not a creature of contract and, therefore, did not arise under the buyer-broker agreement.” (*William L. Lyon & Associates, Inc., supra*, 204 Cal.App.4th at p. 1312, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 914

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker’s Relationship And Obligations To Principal And Third Parties*, ¶ 2:164 (The Rutter Group)

California Real Property Sales Transactions (Cont.Ed.Bar 4th ed.) §§ 2.132–2.136

3 California Real Estate Law and Practice, Ch. 61, *Employment and Authority of Brokers*, § 61.05, Ch. 63, *Duties and Liabilities of Brokers*, §§ 63.20–63.22 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

**4108. Failure of Seller’s Real Estate Broker to Conduct
Reasonable Inspection—Essential Factual Elements (Civ. Code,
§ 2079)**

[Name of defendant], as the real estate [broker/salesperson] for *[name of seller]*, must conduct a reasonably competent and diligent visual inspection of the property offered for sale. Before the sale, *[name of defendant]* must then disclose to *[name of plaintiff]*, the buyer, all facts that materially affect the value or desirability of the property that the investigation revealed or should have revealed.

[Name of plaintiff] claims that [he/she/it] was harmed by *[name of defendant]*’s breach of this duty. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* was *[name of seller]*’s real estate [broker/salesperson];
2. That *[name of defendant]* acted on *[name of seller]*’s behalf for purposes of *[insert description of transaction, e.g., “selling a residential property”]*;
3. That *[name of defendant]* failed to conduct a reasonably competent and diligent visual inspection of the property;
4. That before the sale, *[name of defendant]* failed to disclose to *[name of plaintiff]* all facts that materially affected the value or desirability of the property that such an inspection would have revealed;
5. That *[name of plaintiff]* was harmed; and
6. That *[name of defendant]*’s conduct was a substantial factor in causing *[name of plaintiff]*’s harm.

New June 2013

Directions for Use

Give this instruction if the seller’s real estate broker or salesperson did not conduct a visual inspection of the property and make disclosures to the buyer as required by Civil Code section 2079(a). For an instruction on the fiduciary duty of a real estate broker to his or her own client, see CACI No. 4107, *Duty of Disclosure of Real Estate Broker to Client*.

The duty created by Civil Code section 2079 is not a fiduciary duty; it is strictly a limited duty created by statute. (See *Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797].)

Sources and Authority

- Statutory Duties of Seller’s Real Estate Broker. Civil Code section 2079(a).
- Scope of Required Inspection. Civil Code section 2079.3.
- “Section 2079 requires sellers’ real estate brokers, and their cooperating brokers, to conduct a ‘reasonably competent and diligent visual inspection of the property,’ and to disclose all material facts such an investigation would reveal to a prospective buyer.” (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 23 [73 Cal.Rptr.2d 784], footnote omitted.)
- “Section 2079 was enacted to codify and focus the holding in *Easton v. Strassburger*, *supra*, 152 Cal. App. 3d 90. In *Easton*, the court recognized that case law imposed a duty on *sellers’* brokers to disclose material facts *actually known* to the broker. *Easton* expanded the holdings of former decisions to include a requirement that sellers’ brokers must diligently inspect residential property and disclose material facts they obtain from that investigation. Further, the case held sellers’ brokers are chargeable with knowledge they *should have known* had they conducted an adequate investigation.” (*Field, supra*, 63 Cal.App.4th at p. 24, original italics.)
- “Section 2079 statutorily limits the duty of inspection recognized in *Easton* to one requiring only a *visual* inspection. Further, the statutory scheme expressly states a selling broker has no obligation to purchasers to investigate public records or permits pertaining to title or use of the property.” (*Field, supra*, 63 Cal.App.4th at p. 24, original italics; see Civ. Code, § 2079.3.)
- “The statutory duties owed by sellers’ brokers under section 2079 are separate and independent of the duties owed by brokers to their own clients who are buyers.” (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1305 [139 Cal.Rptr.3d 670].)
- “In accordance with the clear and unambiguous language of section 2079, the inspection and disclosure duties of residential real estate brokers and their agents apply exclusively to prospective buyers, and not to other persons who are not parties to the real estate transaction. Only a transferee, that is, the ultimate purchaser, can recover from a broker or agent for breach of these duties.” (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 165 [11 Cal.Rptr.3d 564].)
- “[W]e are not persuaded by Defendants’ reliance on Civil Code section 2079. Although we agree that that statute sets forth some of the duties of a real estate broker, it is not the only source of a broker’s duties. ‘Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency.’ ” (*Ryan v. Real Estate of the Pacific, Inc.* (2019) 32 Cal.App.5th 637, 646 [244 Cal.Rptr.3d 129].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 174

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Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶ 2:173 et seq. (The Rutter Group)

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, § 63.20 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 et seq. (Matthew Bender)

2A California Points and Authorities, Ch. 31, *Brokers and Salespersons*, § 31.142 et seq. (Matthew Bender)

9 California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.20 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 1, *Duty of Seller of Real Property to Disclose*, § 1:41 (Thomson Reuters West)

4204. “Transfer” Explained

“Transfer” means every method of parting with a debtor’s property or an interest in a debtor’s property.

[Read one of the following options:]

[A transfer may be direct or indirect, absolute or conditional, voluntary or involuntary. A transfer includes [the payment of money/a release/a lease/a license/ [and] the creation of a lien or other encumbrance].]

[In this case, *[describe transaction]* is a transfer.]

New June 2006; Revised June 2016

Directions for Use

This instruction sets forth the statutory definition of a “transfer” within the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act). (See Civ. Code, § 3439.01(m).) Read the second bracketed option for the second sentence if the transaction has been stipulated to or determined as a matter of law. Otherwise, read the first bracketed option. Include only the bracketed terms at the end of the first option that are at issue in the case.

Sources and Authority

- “Transfer” Defined. Civil Code section 3439.01(m).
- “On its face, the UFTA applies to all transfers. Civil Code, section § 3439.01, subdivision (i) defines ‘[t]ransfer’ as ‘every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset . . .’ The UFTA excepts only certain transfers resulting from lease terminations or lien enforcement.” (*Mejia v. Reed* (2003) 31 Cal.4th 657, 664 [3 Cal.Rptr.3d 390, 74 P.3d 166], internal citations omitted.)
- “Civil Code section 3439.01, subdivision (m) broadly defines ‘transfer’ to mean ‘every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, license, and creation of a lien or other encumbrance.’ This definition is broad enough to include transfers of assets by means of executing on a judgment obtained by fraud or collusion.” (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 817 [245 Cal.Rptr.3d 378], internal citation omitted.)
- “Under this definition, there is no doubt that an agreement made *during marriage* in which a debtor-spouse agrees that the nondebtor-spouse’s future earnings, income, or assets would be the nondebtor-spouse’s separate property constitutes a transfer because the debtor-spouse is parting with an interest in an asset—the community property represented by the other spouse’s earnings—in

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which he or she has a ‘present [and] existing . . . interest[] during continuance of the marriage’ ” (*Sturm v. Moyer* (2019) 32 Cal.App.5th 299, 308 [243 Cal.Rptr.3d 556], original italics, internal citations omitted.)

- “In light of the suggestions raised by the legislative language and history, and the strong policy—advanced by both the UFTA and section 911 of the Family Code—of protecting the rights of creditors from fraudulent transfers, we conclude that the Legislature must have intended that UFTA can apply to premarital agreements in which the prospective spouses agree that each spouse’s earnings, income, and property acquired during marriage will be that spouse’s separate property.” (*Sturm, supra*, 32 Cal.App.5th at p. 315.)
- “Transfers to bogus corporations that are wholly owned and controlled by the debtor are ‘transfers’ for purposes of the UFTA.” (*PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 173 [221 Cal.Rptr.3d 353].)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:319 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[1], 270.37 (Matthew Bender)

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